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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1980

GRANT-BILLINGSLEY WHOLESALE LIQUOR CO., INC.,
*Appellant,*

v.

MICHAEL C. LENNEN, SECRETARY OF REVENUE
FOR THE STATE OF KANSAS, et al.,
*Appellees.*

**On Appeal From the Supreme Court of the State of Kansas**

## JURISDICTIONAL STATEMENT

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**August 6, 1980**

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## QUESTIONS PRESENTED

The alcoholic beverage industry in Kansas operates on three independent vertical tiers, including producers, wholesalers and retailers, all of whom are licensed, private enterprises. Kansas is a "license" state, as compared with those "monopoly" states in which the state itself conducts all or part of the business.

For many years, Kansas had "open" wholesaling, under which, subject to credit considerations, producers were obliged to sell to all wholesalers. Under a recent statute ("H.B. 2020"), Kansas requires distilleries and wineries to enter into written territorial agreements with wholesalers, with each producer required to contract with and to sell to only one wholesaler in each territory. H.B. 2020 further forbids wholesalers from selling outside their exclusive territories.

H.B. 2020 totally bans intrabrand competition, regardless of market circumstances or competitive effects. H.B. 2020 originated in a proposal sponsored by a wholesaler trade association. It shields wholesalers from any competition in the brands they carry, regardless of wholesaler market power or of the market share of the brands they represent. The statute puts no limits on the number of brands or the number or size of territories a wholesaler may tie up in the state. H.B. 2020 also severely curtails the ability of producers to replace incumbent wholesalers or to alter the scope of exclusive territories. H.B. 2020 sets up *no* state supervision of the iron-clad territorial restraints that it mandates.

A state trial court struck down the wholesaler fiefdom aspect of H.B. 2020 on federal antitrust grounds. The

Kansas Supreme Court upheld the statute and reversed the trial court. In an opinion rendered shortly before this Court's *Midcal* decision of last Term, the highest state court ruled that the Twenty-first Amendment absolutely overrode the Sherman Act and that H.B. 2020 was not repugnant to the antitrust laws of the United States. The Kansas court explicitly rejected the line of California decisions subsequently approved by this Court in the *Midcal* case. When this Court announced *Midcal,* appellant immediately urged this Court's decision upon the Kansas Supreme Court in connection with a motion for rehearing. The rehearing request was considered, but was denied without opinion.

The questions presented are:

1. Whether the Kansas Supreme Court may disregard *Midcal* by ruling that the Twenty-first Amendment wholly immunizes anticompetitive state liquor statutes.

2. Whether a state liquor statute that prevents intrabrand competition by prohibiting a wholesaler from selling outside its allocated territory, curtails the replacement of incumbent wholesalers, and declares exclusive territorial allocations *per se* legal, in each instance, regardless of market circumstances and wholly without state supervision, is invalid under federal antitrust law.

3. Whether a state statute that resulted in (i) an end to all intrabrand competition in relevant markets with high producer concentration and extensive product differentia-

tion, (ii) a severe wholesaler oligopoly, dominated by two statewide wholesalers, and (iii) horizontal territorial arrangements between remaining wholesalers is invalid under federal antitrust law.[1]

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[1]*List of all parties in the Court below.* The following were parties, directly or by intervention, to the proceedings in the court whose judgment is sought to be reviewed: Grant-Billingsley Wholesale Liquor Co., Inc.; Kansas Distributors, Inc.; Colby Distributing Co., Inc. (which left the business and withdrew from the case); Michael C. Lennen, Secretary of Revenue, State of Kansas; Thomas J. Kennedy, Director of Alcoholic Beverage Control, Division of the Department of Revenue, State of Kansas; Albert P. Campbell, Michael P. Sarras, and Richard D. Martens, all members of the Kansas Alcoholic Beverage Control Board of Review; the State of Kansas, ex rel. Vern Miller, District Attorney for the Eighteenth Judicial District; Standard Liquor Corporation; and the Kansas Retail Liquor Dealers Association. A trial court order of August 3, 1979, granted *amici* status to A-B Sales, Inc., Lux-Witmer Company, Inc., d/b/a Sunflower Sales Company of Topeka, and Eastern Distributing Co., Inc.

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**On Appeal From the Supreme Court of the State of Kansas**

## JURISDICTIONAL STATEMENT

Grant-Billingsley Wholesale Liquor Co., Inc., the appellant, appeals from the final judgment of the Kansas Supreme Court holding that the Twenty-first Amendment wholly negates the Commerce Clause and the Sherman Act and holding that H.B. 2020, which amends certain provisions of the Kansas Liquor Control Act, K.R.S. 41-101, *et seq.*, on its face and as applied is not repugnant to the Sherman Act and the Supremacy Clause of the Constitution of the United States.

### OPINIONS BELOW

The opinion of the Kansas Supreme Court, reprinted as Appendix A hereto,[2] is reported *sub nom. Colby Distribu-*

[2]The appendices to this jurisdictional statement are occasionally cited hereinafter as "App."

*ting Co., Inc. v. Lennen,* at 606 P.2d 102 (1980). The opinion of the state trial court, the District Court of Shawnee County, Kansas, is not reported and is reprinted as Appendix B, *infra.* The case proceeded by direct appeal from the state trial court to the highest state court; accordingly, there is no intermediate state appellate court opinion.

## JURISDICTION

Appellant brought this case to secure a declaratory judgment of the invalidity of H.B. 2020 under federal antitrust law and an injunction against its enforcement. The judgment of the Kansas Supreme Court upholding H.B. 2020 was entered on January 19, 1980. Appendix A, *infra.* That court considered appellant's motion for rehearing but denied it without opinion on April 9, 1980. Appendix C, *infra.* Appellant filed notices of appeal in the Kansas Supreme Court and in the state trial court (to which the record has been returned) on June 25, 1980. Appendix D, *infra.* Mr. Justice White, as Circuit Justice, extended the time for filing this jurisdictional statement to and including August 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions, in pertinent part:

U.S. Const., Art. I, § 8, cl. 3 (Commerce Clause):

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . .

U.S. Const., Art. VI, cl. 2 (Supremacy Clause):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be

bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. Const., Amendment XXI, § 2:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 1 of the Sherman Act, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

H.B. 2020 (Kansas "Territorial Franchise System"):

> Due to its length, the pertinent text of H.B. 2020 is set out in Appendix E, *infra.*

## RAISING THE FEDERAL QUESTIONS

In its pleadings, briefs and arguments in the state trial court, appellant drew in question the validity of H.B. 2020 on the grounds of its repugnancy to federal antitrust law and the Supremacy Clause. That court struck down the provisions of H.B. 2020 now at issue on the federal grounds that appellant asserts in this Court.

The federal law questions were again briefed and argued on the direct appeal to the Kansas Supreme Court, and that court also ruled on them directly, reversing the trial court and upholding the state statute. Appellant put the line of California decisions subsequently approved by this Court in *California Retail Liquor Dealers Association v.*

*Midcal Aluminum, Inc.*, No. 79-97, OT 79 (100 S.Ct. 937, March 3, 1980) before the Kansas courts at all pertinent stages. When *Midcal* came down from this Court, it was put before the Kansas Supreme Court in conjunction with appellant's motion for rehearing.

## STATEMENT OF THE CASE

This case concerns the validity under federal antitrust law of the wholesaler territorial exclusivity arrangements that H.B. 2020 recently brought about in Kansas. H.B. 2020 significantly changed the wholesale liquor business in the state.

### A. Open Wholesaling Before H.B. 2020

Distilled spirits and wines are sold in Kansas under a three-tier distribution system. Distillers and vintners sell to wholesalers (distributors), who in turn sell to retailers. No person licensed at one level of this system may have an interest in a licensee operating at another level (known as the "tied-house" prohibition, K.R.S. 41-312). The state itself does not do business at any level of the industry. The requirement of three tiers is unaffected by H.B. 2020 and is not at issue in this case.

Before H.B. 2020, Kansas required "open" wholesaling. All brands of spirits and wine sold in the state were carried by all distributors, without defined "territories" or "franchises." K.R.S. 41-1011. A state regulatory agency set minimum prices to retailers and consumers. *Id.*, § 41-1115.

In the years immediately before H.B. 2020, nine distributors did business in the state, serving approximately 1,200 retailers. C.T. 12.[3] The largest of these distributors

[3] "C.T." references are to the clerk's transcript of the trial court record. "R.T." references are to the reporter's transcript of the trial conducted before the state trial court. "R.T.(I)" refers to the first volume of the transcript, and "R.T.(II)" to the second.

had about 25% of the total wholesale business in 1978, the second largest about 20%, with the remaining seven distributors having fragmented, smaller shares. *Id.*, 13-14. These market shares were changed dramatically by H.B. 2020.

### B. H.B. 2020: Airtight Territorial Restraints and the Total Elimination of Intrabrand Competition

#### 1. THE TOTAL ELIMINATION OF INTRABRAND COMPETITION

H.B. 2020, reprinted in Appendix E, *infra*, became law in May, 1979. The statute effects a complete swing from "open" wholesaling (all brands for all wholesalers) to total elimination of intrabrand competition by requiring exclusive, airtight territorial agreements between individual producers and wholesalers.

H.B. 2020 requires producers and Kansas distributors to make written agreements allocating impenetrable territorial monopolies to particular distributors for particular brands. A distributor may sell only to retailers within its territory (although that territory may be the entire state). H.B. 2020 permits no intrabrand competition, since a producer may enter into an agreement with only one distributor for each brand in each territory (dual distributors are prohibited), and a retailer may buy only from the exclusive distributor appointed by the producer for the retailer's area. There is no limit upon the number of producers or brands that one distributor may tie up in the state; accordingly, interbrand competition may be reduced to a "shadow-boxing" exercise within the sales force of a single distributor. *See, e.g.*, R.T.(II), at 66. Indeed, the statute apparently would sanction a single-firm, wholesale monopoly.

#### 2. THE ABSENCE OF STATE SUPERVISION

Although H.B. 2020 provides that written territorial agreements between producers and distributors must be

filed with a state regulatory agency, there is no state supervision of the restraints created by these private agreements. Neither H.B. 2020 nor any other statute sets out guidelines regarding the size or number of intrabrand monopoly territorial allocations which may be granted to any one wholesaler, the number or market dominance of the brands allocated to a particular wholesaler, the permissible market shares of wholesalers, the duration of the restraints, or any other core antitrust interest. There is no regulatory mechanism for supervision or re-examination—active, continuing, pointed or otherwise—of the airtight territorial allocations or their intensely anticompetitive effects.

### 3. ENTRENCHMENT OF WHOLESALER MARKET POWER

H.B. 2020 sets no time limits on the mandated restraints. Moreover, the statute provides that once a territorial agreement is reached, it may not be modified, altered or terminated except for "reasonable cause." App. E, at 49a-50a. The "reasonable cause" impediment to termination or modification of the restraints is not defined. Nonetheless, the incumbent, entrenched distributors are authorized to go to court to enforce the "reasonable cause" provision against any producer that attempts to alter its distribution arrangements. State regulatory agencies are given no role in this matter. Thus, a producer that wishes to increase the efficiency of distribution patterns or to terminate an incompetent wholesaler confronts the substantial deterrent of costly litigation under a hopelessly vague legal standard, unclarified by regulation. Since producers cannot designate duplicate distributors and as a practical matter cannot switch distributors, they cannot prevent disfavored treatment of their brands.

H.B. 2020 also shields the incumbent wholesalers from competition by blocking new entry. Because of H.B. 2020,

the incumbents have sewn up wholesale distribution of the brands sold in the state. A potential new entrant at the distributor level is unlikely ever to be able to obtain brands to distribute in the state. This also means that new producers desiring to sell in the state who cannot interest the incumbents in new brands may not be able to obtain distribution.

### C. How H.B. 2020 Went Into Effect

H.B. 2020 went into effect in two stages, each originally designed to be of two months' duration. C.T. 38-42. During phase I (May 10 to July 10, 1979), wholesalers and producers were directed to enter into the contracts that would set up the mandated territorial exclusivity. *Id.*, 38-39. This was an "open season" for tying up brands, and there was a scramble for exclusivity wholly unregulated by the state. Phase I was supposed to end on July 10, 1979, but a trial court order kept it open temporarily, with the result that phases I and II came to a close roughly simultaneously. App. A, at 6a; C.T. 43-44.

Phase II (July 11, 1979 to September 10, 1979) was designed to be a transitional period during which wholesalers who lost out in phase I would dispose of their inventories in brands they could no longer represent. C.T. 39-41. On September 10, 1979, H.B. 2020 went into full effect. App. A, at 12a.

The state alcoholic beverage regulatory agency in Kansas categorizes spirits into separate classifications (rum, vodka, gin, varieties of whiskey, etc.) and keeps official records of the annual volume of sales of each category in the state.[4] Industry publications and the dis-

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[4]These official state market share documents and data were introduced into evidence by the defendant state officials at trial. See Kansas Division of Alcoholic Beverage Control "Report Concerning

tributors themselves adopt the same classifications. R.T. (I), at 12; R.T. (II), at 58-59; C.T. 34-35. The combination of the contracts formed during phase I (the "sign-up" period) plus the official records made it possible to know with precision by mid-July, 1979, when this case was initiated, the market shares of spirits producers selling in the state and the post-H.B. 2020 market shares held by the wholesalers who obtained contracts during the phase I implementation period. See R.T.(I), at 11-23; plaintiffs' trial exs. 2-5; defendants' trial ex. 1.

The state market share data demonstrate that in each category of spirits, a handful of distilleries has the bulk of the business. The data, coupled with trial testimony, show that H.B. 2020 was superimposed on relevant markets dominated by a small number of producers, dealing in heavily advertised, strongly differentiated products—scarcely an environment conducive to wide-open interbrand competition, or likely to be improved by the introduction of absolute intrabrand restraints.

The state data show that in the instance of rum, for example, one producer has 90% of the business. In blended whiskies, as another example, one producer has 63.4% of the business, with a two-firm concentration ratio of 86.8%. Light whiskies evidence comparable duopoly characteristics. In fact, most of the categories of spirits sold in the state exhibit a high concentration ratio at the producer level.[5] Moreover, spirits brands and categories are strongly

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Shipments of Alcoholic Liquors by Classification and Brands from Distillers to Kansas Distributors for Fiscal Year July 1978 through June 1979." R.T.(I), at 16-20; defendants' trial ex. 1.

[5]The one, two, three and four firm concentration ratios for the categories of spirits sold in the state are set forth in Appendix F, *infra*.

differentiated in consumer perception. R.T.(I), at 45-46; R.T.(II), at 67-69.

H.B. 2020 eliminated intrabrand competition in the highly concentrated categories of spirits sold in the state. It also further diminished the already limited interbrand competition, for it created severe oligopoly at the distributor level. Two distributors, Standard and Famous, obtained statewide franchises for many of the dominant spirits brands. Plaintiffs' trial exs. 2-5; defendants' trial ex. 1. Standard ended up with almost 50% of the wholesale spirits business in the state and Famous with about 25%. *Ibid.*

The remaining distributors formed two groups. Each group allocated areas among its members and then, as a unit, sought contracts from the producers. R.T.(I), at 23; R.T. (II), at 29-31, 42. The first group is referred to as "Combo III." The second group, which included appellant, Kansas Distributors, Inc., and Colby Distributing Co., has been all but shut out of the market. Apellant's share of the spirits market has fallen from 7.63% to about two and one-half percent. C.T. 14; R.T. (I), at 25. The share for Kansas Distributors, Inc., has been reduced from 9.74% to slightly more than three percent. C.T. 14; R.T.(II), at 27. Colby sold its assets to Standard, the now dominant wholesaler, and to Combo III.

Yet another distributor, D. A. Winters Co., also left the business. The realistic sum of these developments is that H.B. 2020 reduced participation in the wholesale spirits business in the state from nine separate firms to three, the third "firm" being a horizontal combination.

The following data, taken from plaintiffs' trial ex. 2, illustrate by volume of case purchases the degree of dominance H.B. 2020 conferred on the two largest spirits wholesalers:

| Category | % Standard | % Famous | % Together |
|---|---|---|---|
| Rum | 95.09 | 2.28 | 97.37 |
| Tequila | 88.06 | 6.79 | 94.85 |
| Blended Whiskey | 64.58 | 29.24 | 93.82 |
| Brandy | 70.50 | 16.85 | 87.35 |
| Cocktails | 69.30 | 15.17 | 84.47 |
| Canadian | 59.91 | 22.04 | 81.95 |
| Scotch | 36.45 | 42.80 | 79.25 |
| Flavored Vodka | 72.57 | — | 72.57 |
| Gin | 28.24 | 43.97 | 72.21 |
| Vodka | 34.01 | 18.10 | 52.11 |

## D. The Trial Court Proceedings and Ruling

### 1. TRIAL COURT PROCEEDINGS

Appellant and two other wholesalers brought this action in state court in July 1979, against the pertinent state officials, seeking an injunction against implementation and enforcement of H.B. 2020 and a declaration of its invalidity under Sections 1 and 2 of the Sherman Act, as well as other grounds. On July 17, 1979, a state trial judge temporarily enjoined phase I of H.B. 2020 and set the matter for expedited trial on the merits. C.T. 43-44. Thereafter, a county district attorney, the Kansas Retail Liquor Dealers Association, and wholesalers other than the plaintiffs came into the case, either as intervenors or *amici*, for and against the validity of H.B. 2020. App. B, at 24a; C.T. 85. The matter was tried in state trial court on August 6 and 7, 1979.

At trial, both sides presented evidence as to the effects of H.B. 2020 upon competition at both the producer and distributor levels. In addition to documentary market share data, including the materials mentioned above, there was considerable testimony as to the economic effects of H.B. 2020.

Dr. William T. Terrell, an economist, testified against H.B. 2020. For a period of time before the enactment of H.B. 2020, Dr. Terrell undertook an independent study of liquor distribution in Kansas. R.T.(I), at 112.[6] Terrell testified that H.B. 2020 would shift the wholesale market away from competition and towards monopoly, *id.*, 115, and that the statute threatened grievous and pernicious anti-competitive effects. *Id.*, 116. He testified that under the former law, the existence of rivals for sales of particular products to retailers led to lower prices, good delivery service and adequate inventories of products. *Id.*, 119-20. Distributors could not raise prices above state minima for particular brands, for other distributors carrying the same brands would simply take the business. *Id.*, 120. H.B. 2020 would substantially eliminate this pro-competitive effect. *Id.*, 123-25.

Dr. Terrell further explained that H.B. 2020 insulates distributors from competition from new entrants, since it fails to provide the means for new entry by wholesalers, by tying the available brands exclusively to the surviving incumbents. R.T.(I), at 123-24. Terrell pointed out that H.B. 2020 inevitably would eliminate some of the existing distributors for reasons unrelated to the free play of competitive forces. *Id.*, 124-25. Under H.B. 2020, prices to consumers will increase to reflect the monopoly status of the surviving wholesalers. *Id.*, 129. Terrell characterized the probable effect of H.B. 2020 as the exclusion of all but the most powerful wholesalers, leading ultimately to monopoly profits for the survivors. *Id.*, 137. H.B. 2020, Dr. Terrell concluded, serves no one's interest except the powerful surviving distributors. *Id.*, 130.

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[6]Terrell's study was referred to by the Kansas Supreme Court as an "excellent discussion of the historical and economic background of alcoholic liquor in Kansas. . . ." App. A, at 4a-5a.

Defendants called State Senator Frank Gaines to testify as to the legislative history of H.B. 2020. R.T.(I), at 59. Gaines testified that he headed an interim committee, the Special Committee on Liquor Laws, which heard testimony from various interested parties before submitting proposed legislation which became H.B. 2020. *Ibid.* As the court below noted, "H.B. 2020 was the result of the Committee's study." App. A, at 5a. Frederick M. Switzer, counsel for the Wine and Spirits Wholesalers of America (WSWA), appeared before the Committee and was particularly influential in its deliberations. R.T.(I), at 66. Gaines testified that Switzer's work on alcoholic beverage distribution systems was presented to the Committee, *id.*, 69, and that Senate Bill 28, which as amended became H.B. 2020, was written by Mr. Switzer in St. Louis, the headquarters of WSWA. *Id.*, 82. WSWA is a trade association representing the interests of member wholesalers.

Senator Gaines acknowledged that some distributors would "go under" as soon as H.B. 2020 was "determined." R.T.(I), at 86. He also testified as to the total lack of state supervision of the H.B. 2020 distributor territories. He admitted that the matter was left entirely to the discretion of the private parties involved, R.T.(I), at 85, and further conceded that there were no state guidelines regarding the allocation of the exclusive territories. *Id.*, 98.

Jack F. Grant, president of appellant, testified that his company lost two-thirds of its sales following the enactment of H.B. 2020, R.T.(I), at 25, and that that kind of decline would eventually put Grant-Billingsley out of business. *Id.*, 26. Mr. Grant also described the pernicious effect of H.B. 2020 upon interbrand competition. He pointed out that there had been interbrand competition before H.B. 2020, *id.*, 45, but that afterwards leading brands would be controlled by the same wholesaler. *Id.*, 51-52.

This detrimental effect upon interbrand competition was also brought out in testimony by Leslie J. Rudd, President of Standard Liquor Corporation, the Kansas distributor made dominant by H.B. 2020. Mr. Rudd conceded that under the prior law, competition between distributors kept prices down to the lowest level permitted by law. R.T.(II), at 61-62. He also agreed that under H.B. 2020, Standard, as an exclusive distributor, would be free to set prices at levels it chose. *Id.,* 60. As to interbrand competition, he further agreed that the only competition generated between brands in the same category which his company distributed would be within his own company's sales force. *Id.,* 66.

**2. TRIAL COURT RULING**

On August 31, 1979, the state trial court issued a memorandum opinion and judgment on the validity of H.B. 2020. App. B. Following findings as to the anticompetitive nature of H.B. 2020, the trial court concluded, *inter alia,* that:

(a) the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, from which the Sherman Act derives, but merely requires that each constitutional provision be considered in the light of the other (App. B, at 34a);

(b) H.B. 2020 compelled private parties to engage in anticompetitive territorial agreements without state supervision and in violation of the Sherman Act (*id.,* 36a); and

(c) H.B. 2020's monopoly franchise regime bore "no reasonable rational relation to the purpose of fostering temperance and orderly marketing conditions" and "does not tend to preserve public health, safety or welfare but has a tendency to stifle legitimate business by creating a monopoly or trade barrier, in violation of the Sherman Act. . . ." *Ibid.*

The trial court invalidated the territorial exclusivity provisions of H.B. 2020. The court temporarily held up its judgment, to permit the state defendants to take an immediate direct appeal to the Kansas Supreme Court.

### E. The Kansas Supreme Court Decision

The Kansas Supreme Court initially stayed the judgment of the state trial court, permitting H.B. 2020 to go into full force and effect on September 10, 1979, the originally scheduled date for full effectiveness. On the merits, the highest state court upheld H.B. 2020, reversing the trial court on both Twenty-first Amendment and federal antitrust grounds.

#### 1. THE TWENTY-FIRST AMENDMENT RULING

The highest state court first ruled that the Twenty-first Amendment gave the state absolute control over the liquor industry, wholly unrestricted by the Commerce Clause or by federal antitrust law. App. A, at 15a-18a. The court entered this ruling while the *Midcal* case was *sub judice* at this Court. The Kansas court cited the California line of decisions culminating in *Midcal* (subsequently affirmed by this Court), but concluded that the California decisions were "contrary to our law and without precedent in Kansas." *Id.*, 20a. Although presented with the opportunity on rehearing to correct its ruling to reflect this Court's *Midcal* decision, the Kansas Supreme Court declined to do so, without opinion. App. C.

#### 2. THE RULINGS ON FEDERAL ANTITRUST LAW

In addition to its Twenty-first Amendment ruling, the court below found "another rationale for upholding H.B. 2020." App. A, at 18a. That "rationale" was the court's conclusion that H.B. 2020 comported with the Sherman Act, for two reasons—neither of which, it should be noted, is supported by citation to any Sherman Act authorities.

First, the court saw no difficulty in the fact that because of H.B. 2020, two wholesalers ended up with the exclusive right to distribute two-thirds of the spirits brands sold in the state.[7] This was because H.B. 2020 had left all wholesalers in the state free to attempt to corner the market during the phase I sign-up period, and the fact that the bidding for market dominance had gone to the strongest not only did not offend the Sherman Act but was what barefisted competition was all about. In the court's words, H.B. 2020 presented:

> ". . . ample opportunity for each [wholesaler] to exercise its own perseverance to obtain products and territory. If one or more fails to obtain its share of the market the law is not at fault; it is one of the hazards of a free market." App. A, at 19a.

Second, the court stated that H.B. 2020 allowed "sufficient brand and price competition to withstand allegations of a violation of the Sherman Anti-Trust Act." *Ibid.* This was because "there are now at least two distributors operating in every area of the state . . . ," *id.*, 19a, and each "distributes different brands, which compete with one another." *Ibid.* In placing its reliance on interbrand competition, the court failed to note that previously there had been nine wholesalers carrying all competing brands and that because of H.B. 2020, one wholesaler ended up with as much as ninety-five percent of a particular category of

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[7]The Kansas court attributed market shares of about 30% to each of the dominant wholesalers. App. A, at 18a. The court misunderstood the evidence offered on this point. It is true that Standard and Famous each represent about 30% of the spirits brands sold in the state. R.T.(I), at 22. However, these two wholesalers obtained the popular, dominant brands which sell in larger volume than other brands. *E.g.*, R.T. (I), at 16, 48-49. Accordingly, on a volume of sales basis—the actual market share—Standard and Famous obtained about three-fourths of the business. Plaintiffs' trial exs. 2-5; defendants' trial ex. 1.

spirits throughout the state and very large shares of other categories. Apparently the court's theory was that so long as all brands were not allocated to the dominant wholesaler, there was sufficient interbrand competition to uphold a total ban on intrabrand competition.

Nor did the court address the high degree of concentration at the producer level of the industry and the strong degree of product differentiation in the business, factors that bear on the unlikelihood of healthy interbrand competition in Kansas, regardless of the structure of the wholesale level of the industry. The court was equally silent on why it should be presumed that interbrand competition would be vigorous at the wholesale level under the severe oligopolistic conditions brought about by H.B. 2020.

#### 3. STATE ACTION

The court below conceded that the "size of the franchise territory and the designation of brands are left to private agreement. . . ." In short, there was no state supervision. However, in the opinion of the court, this was a plus rather than a negative for the validity of H.B. 2020, for leaving such market restraints to private agreement was "under the best traditions of a free society." App. A, at 20a.

#### 4. THE STATE INTERESTS UNDERLYING H.B. 2020

H.B. 2020 contains no statement of state purpose. In various passages of its opinion, the Kansas Supreme Court listed a number of state interests thought to be advanced by H.B. 2020. The court referred to promotion of temperance and orderly markets, protection of the general welfare, health and safety of the people of Kansas, increasing state tax revenues and curbing illegal importation by reducing retail prices and thus reducing the tendency of consumers to buy out of state, and passing of the results of competition on to consumers. App. A, at 5a, 7a-8a, 20a, 22a-23a.

The court did not articulate how lower retail prices, assuming that H.B. 2020 brought them about, would promote temperance, orderly marketing conditions, or the general welfare, health and safety of the people of Kansas. Nor did it indicate how the bestowal of intrabrand monopoly power on the surviving wholesalers would advance those interests. Nor did the court deal with the conflict between two of the purposes it attributed to H.B. 2020—hold up retail prices to promote temperance and protect retailers from price competition, yet reduce retail prices to discourage consumers from buying out of state.

The interests of curbing illegal out-of-state buying by Kansans and thereby increasing state tax revenues through increased sales in Kansas depend, as the court recognized, App. A, at 8a, 20a, on the achievement of lower retail prices. Yet the court did not discuss whether extensive price competition was likely in a substantial oligopoly, where intrabrand competition is forbidden.[8]

## THE QUESTIONS ARE SUBSTANTIAL

### A. Midcal Requires Reversal of the Kansas Court's Twenty-first Amendment Ruling

The court below ruled that the Twenty-first Amendment permits Kansas to enact liquor legislation wholly unfettered by the Commerce Clause and, therefore, by the Sherman Act. The last full paragraph of the state court's opinion, App. A, at 22a-23a, suggests that this reading of the Twenty-first Amendment colors every aspect of the court's decision. As shown by the *Midcal* decision of last Term,[9]

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[8] *See* "Law hasn't cut Kansas liquor cost," *Kansas City Star*, p. A-1 (July 8, 1980) (state records show that retail prices have risen since H.B. 2020).

[9] *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, No. 79-97, OT 79, 100 S.Ct. 937 (1980).

the lower court's interpretation of the Twenty-first Amendment is plainly erroneous. Because the Kansas court has already denied rehearing in the face of *Midcal*, the appropriate disposition of this case would appear to be summary reversal. The antitrust aspects of the case suggest the same disposition.

### B. H.B. 2020 Is Invalid on its Face under Federal Antitrust Law

In H.B. 2020, Kansas has attempted to repeal the Sherman Act with respect to territorial restraints. The state has ordered wholesale substitution of the unencumbered and unsupervised self interest of private parties for the competitive processes and concerns protected by the Sherman Act. The significance of such an attempt is obvious. If Kansas lawfully can do what it has attempted here, the Sherman Act and the other federal antitrust laws will have no effect in those states with private liquor lobbies strong enough to persuade the state legislatures that competition is not in the public interest.

H.B. 2020 is so evidently invalid on its face under federal antitrust law that further inquiry is unnecessary, further proceedings below would be pointless, and summary reversal is the correct disposition. This conclusion follows from the facial implications of H.B. 2020 and the basic requirements of federal antitrust law, wholly apart from the facts of what happened in Kansas as H.B. 2020 went into force and regardless of the appropriate Sherman Act standard (*per se*, rule of reason, or other category) to apply to the statute.

H.B. 2020 requires that all wholesalers enter into agreements which absolutely prohibit their right to sell outside of a designated territory. The restrictions on termination or modification of territories in the statute augment the exemption from competition extended to wholesalers. H.B. 2020 creates "[t]erritorial monopolies, intrabrand. . . ."

*In re Coca-Cola Company,* 91 F.T.C. 517, 612 n.12 (1978). These "airtight" territorial restraints[10] are required regardless of the market share of the affected producer, the market share of the distributor, or any other relevant facts. Furthermore, H.B. 2020 contains no provisions which allow the state to evaluate or approve the mandatory territorial restraints agreed to by private parties, and the state has no power to modify the territories established by their agreements. H.B. 2020 thus attempts to create an absolute bar to any consideration of the market effects of privately established agreements, contrary to this Court's decisions requiring economic analysis for the purpose of determining whether a non-price vertical restraint amounts to an unlawful, unreasonable restraint of trade.

As noted below, H.B. 2020 should be subjected to a standard of *per se* illegality or, at a minimum, presumptive invalidity, because of the intensely anticompetitive nature of the restraints it mandates. However, even if one assumes that H.B. 2020 falls under rule of reason analysis, it is nonetheless patently invalid on its face because it excludes consideration of the very economic and other factors that the rule of reason demands be taken into account. Since the statute is facially invalid under standard rule of reason analysis, it is *a fortiori* invalid under any more stringent test.

This Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) substituted a rule of reason for a *per se* approach to the general run of non-price vertical restraints. However, "[t]hat a practice is not *per se* unlawful does not mean that it is *per se* lawful." *Eiberger v. Sony Corp. of America*, 1980-2 Trade Cas. ¶ 63,328, at 75,692 (2d Cir. 1980). The rule of reason under

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[10]*See Pitofsky, The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions,* 78 Colum. L. Rev. 1, 4 n.10 (1978).

the Sherman Act requires a "careful assessment" and a "discriminating examination" of economic and market factors in analyzing the legality of particular restraints of trade. *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 U.S. 1, 16, 24 (1979). H.B. 2020 forbids *any* assessment or examination, much less a careful and discriminating analysis, of the private restraints it compels. It attempts to declare all such restraints *per se* lawful in perpetuity, regardless of the circumstances. H.B. 2020 is, accordingly, invalid on its face, regardless of the appropriate Sherman Act standard which should be applied to it. As to this pure point of law, the facts of the proceedings below are irrelevant.

### C. On the Record Presented, H.B. 2020 Is Invalid Under Federal Antitrust Law

This Court's *Sylvania* decision did "not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition. . . ." 433 U.S., at 58. The manifestly anticompetitive nature of the airtight restraints mandated by H.B. 2020 justifies application of the residuum of the *per se* rule permitted by *Sylvania. See id.,* at 49-50, 58; Pitofsky, *supra,* 78 Colum. L. Rev., at 8-9, 28-34. At a minimum, such particularly anticompetitive restraints should be subject to a "rule of presumptive illegality." Baker, *Vertical Restraints in Times of Change,* 44 Antitrust L.J. 537, 544-46 (1975); Zelek, et al., *A Rule of Reason Decision Model After* Sylvania, 68 Cal. L. Rev. 13, 29-36 (1980). *Accord,* F.M. Scherer, Industrial Market Structure and Economic Performance 510 (1970) ("hard-boiled" rule of reason).

In the face of these authorities, the court below apparently applied an eviscerated rule of reason approach—so long as a scintilla of interbrand competition could be hypothesized, the most egregious forms of perpetual intra-

brand restraints were lawful, regardless of market conditions, degree of market power, efficiency of market performance, or any other pertinent factor. The approach of the Kansas Supreme Court is erroneous even under the rule of reason. On the record presented, this Court should reverse, correct the erroneous approach followed below, and establish the governing legal standard for restraints on competition such as the ones H.B. 2020 mandates.

1. The dangers of a statute such as H.B. 2020 are not unique to Kansas. The distilled spirits industry exhibits nationally a high degree of market concentration. *E.g.*, *Impact*, September, 1979. A wealth of authority recognizes the particular importance of preserving a maximum of intrabrand competition when interbrand competition is impaired by extensive market concentration. *E.g.*, Zelek, et al., *supra*, 68 Cal. L. Rev., at 30; Pitofsky, *supra*, 78 Colum. L. Rev., at 35; Louis, *Vertical Distribution Restraints After* Sylvania, 76 Mich. L. Rev. 265, 274-77 (1977); Strasser, *Vertical Territorial Restraints After* Sylvania, 1977 Duke L.J. 775, 802; ABA Antitrust Section, Monograph No. 2, *Vertical Restrictions Limiting Intrabrand Competition* 63-64 (1977); L. Sullivan, Handbook of the Law of Antitrust § 149 at 429 (1977). *See Sylvania, supra*, 433 U.S., at 51 n.19 (validity of intrabrand restraints presumes healthy interbrand competition); 63-64 (White, J., concurring) (stressing Sylvania's "faltering, if not failing" market position). Nonetheless, liquor wholesaler statutes designed to inhibit intrabrand competition exist in a number of states. Several of these statutes approach the extreme degree of anticompetitiveness exhibited by H.B. 2020.[11] All of these statutes curb interbrand rivalry in an

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[11] *See, e.g.*, Me. Rev. Stat. tit. 28, § 665 *et seq.*; Vt. Stat. Ann. tit. 7, § 701 *et seq.* *See also* Ga. Ad. Code § 560-2-3-.10. *See* F. Switzer, The Three-Tier System of Distribution in the Wine and Spirits Industry 17 (1975), defendants' trial ex. 2.

industry where the degree of market concentration mandates maximum preservation of intrabrand competition.

*Midcal* means that these anticompetitive franchise statutes, enacted before *Midcal,* will now be subjected to antitrust scrutiny. The issue is of national importance, and this Court should settle the governing antitrust standards applicable to such statutes.

2. This Court declared in *Midcal* that: "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and *how to structure the liquor distribution system.*" 100 S.Ct., at 946 (emphasis added). In the context of the full opinion, the emphasized language logically could not have been intended to shelter private market allocation schemes any more than private price fixing schemes. Judging by footnote 9 of *Midcal*, by the literal terms employed, and by full context, the language emphasized above addresses state ownership of some part of the business or such structural matters as the three tier requirement in Kansas, which is not challenged in this case.

Nonetheless, the *Midcal* "virtually complete control" language is being cited in defense of restrictive state statutes relating to liquor distribution, as in, for example, *Norman Williams Company v. Rice*, Court of Appeal for the Third Appellate District, State of California (July 17, 1980).[12] This Court should end any ambiguity on the

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[12]*Norman Williams* involves a California statute prohibiting a licensed importer from purchasing or accepting delivery of any brand of distilled spirits unless designated as an authorized importer of that brand by the brand owner or its agent. Applying *Midcal*, the state intermediate appellate court (the same court affirmed by this Court in *Midcal*) struck down the statute. The decision is subject to further review within California.

The state appellate court in *Norman Williams* confronted the *Midcal* language emphasized above. The state court concluded that

point, which has considerable significance to a number of state liquor statutes across the country.

3. H.B. 2020 constitutes "plain protectionism." Baker, *supra*, 44 Antitrust L.J., at 543. It is a blatant special interest statute that springs from anticompetitive purposes and that produces sharply anticompetitive effects.[13] The competitive harms are not simply to intrabrand competition but also to interbrand concerns. Statutes like H.B. 2020 directly suppress new entry at the wholesaler level and indirectly at the producer level (new producers have difficulty obtaining distribution), and they are an invitation to horizontal coordination. Their effects "approximate horizontal market allocation." Pitofsky, *supra*, 78 Colum. L. Rev., at 9. The arrangements they create deserve invalidation as a horizontal evil. *See* L. Sullivan, *supra*, at 431. *See United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

Despite the severe anticompetitive harms inflicted by H.B. 2020, which appear to contravene not only Section 1 of the Sherman Act but also Section 2, the court below upheld the statute simply by hypothesizing an increase in interbrand competition. The hypothesis defies credulity

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the "how to structure the liquor distribution system" phrase of *Midcal* addressed such basic structural matters as whether to install a licensing system but did not shield the "primary source" requirement of the state statute before the court from the Commerce Clause.

[13] *Cf. National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) (emphasis added, footnote omitted):

> ". . . [T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, *or in the interest of the members of an industry*. . . . [T]hat policy decision has been made by the Congress."

in the circumstances, because precisely the opposite occurred, but of greater importance, such an approach would eviscerate even the rule of reason as applied to such patently offensive statutes. This Court should clarify the error in the approach followed below and further clarify that the state interests purportedly at stake either bear no rational relationship to the requirements of H.B. 2020 or are outweighed by the severity of harm to fundamental federal antitrust interests.

If the restraints brought about by H.B. 2020 were legal, there was no need for the statute. H.B. 2020 can only be an attempt to exonerate restraints otherwise unlawful, to provide an insurance policy against the Sherman Act. However, only Congress can repeal the Sherman Act, and it has not done so for the liquor industry. Thus, the only basis for a contention that H.B. 2020 is valid is the Twenty-first Amendment. Yet *Midcal* holds that the Twenty-first Amendment does not protect unsupervised private agreements which contravene the antitrust laws.

## CONCLUSION

For the foregoing reasons, the decision below should be summarily reversed or, alternatively, the appeal should be given plenary consideration.

Respectfully submitted,

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## Appendix A

In the Supreme Court of the State of Kansas

No. 51428

January 19, 1980

Colby Distributing Co., Inc., et al.,
Appellees,

v

Michael Lennen, et al.,
Appellants.

Syllabus by the Court

1. Pursuant to the Twenty-first Amendment, a state may absolutely prohibit the manufacture, transportation, importation, sale or possession of alcoholic liquors irrespective of when or where produced or obtained, or the use to which they are to be put, and may adopt measures reasonably appropriate to effectuate those prohibitions and exercise full police authority in respect to them, unfettered by the due process clause, the equal protection clause or the commerce clause.

2. The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution.

3. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it and if there is any reasonable way to construe the statute as constitutionally valid, that should be done.

4. In a civil action, the record is examined and it is *held:* The trial court erred in holding pertinent sections of House Bill 2020 unconstitutional.

HERD, Justice:

This is an action seeking a declaratory judgment and permanent injunction from the enforcement of 1979 amendments to the Kansas Liquor Control Act (K.S.A. 41-101 *et seq.*). The amendments were enacted by the legislature, effective May 10, 1979 and are designated House Bill 2020. The trial court found the act constitutional but found certain sections of the amendments in violation of the Sherman Anti-Trust Act. 15 U.S.C. § 1 *et seq.* We hold H.B. 2020 constitutional, thus reversing in part and affirming in part the judgment of the trial court.

A brief discussion of the history of Kansas liquor laws will be helpful in understanding the issues before us. In 1880, Kansas amended its constitution providing for prohibition. Kan.Const. art. 15, § 10. Bootleggers and illegal saloons flourished, however, until Carry Nation and others aroused public indignation by their attacks on illegal liquor traffic at the turn of the century. Feelings of both anti-saloon and pro-saloon forces became increasingly violent until finally, urged on by the fear of armed conflict, the legislature passed laws making it a penal offense for one to give another a drink of alcoholic liquor, to be found in a place where it was sold, to sell it and finally to possess alcoholic liquor. L.1881, Ch. 128, §§ 2, 10. The latter was known as the "bone dry law."

Ultimately in 1948, the citizens of Kansas recognized prohibition neither ended liquor consumption nor eliminated its sale. The constitution was amended to permit the legal sale of liquor. L.1947. Ch. 248, § 1. As a result the Kansas Liquor Control Act (K.S.A. 41-101 *et seq.*) was passed in 1949 ending 69 years of constitutional prohibition. It provided for the regulation of the manufacture, distribution, sale, possession and consumption of alcoholic liquors. The act has remained virtually unchanged except for the 1965 Private Club Act (K.S.A. 41-2601 *et seq.*) and the 1978 Restaurant Club Act (K.S.A. 1978 Supp. 41-2601 *et seq* and K.S.A. 1978 Supp. 41-803). It provides for a three-tiered distribution system composed of a manufacturer, distributor and retailer, none of whom may own any interest in the other and all are licensed by the state.

The original law required that alcoholic liquor be sold subject to the provisions of the Kansas Fair Trade Act (G.S. 1949, 50-301—50-310) which effectively established a minimum price. The Fair Trade Act was declared unconstitutional and void, in violation of Art. 2, § 1 of the Constitution of Kansas, in 1958. *Quality Oil Co. v. du Pont & Co.*, 182 Kan. 488, 322 P.2d 731 (1958). During the 1959 legislative session, a liquor price control act was enacted which governed the sale price of alcoholic liquors. In 1961 it was found unconstitutional by this court on the grounds it was an unauthorized delegation of legislative authority to private persons without guidelines. *State, ex rel. v. Mermis*, 187 Kan. 611, 358 P.2d 936 (1961).

Immediately following that decision, the legislature enacted the liquor price control law (K.S.A. 41-1111—41-

1121) which remained effective until H.B. 2020 went into effect. It provided that the pricing began with the manufacturer who must sell to the distributor at a price "as low as the lowest price for which the item is sold anywhere in any state in the continental United States . . . ." K.S.A. 41-1112. This is known as a price affirmation law. It should be noted the legislature delegated the authority to fix the beginning price on liquor to the manufacturer from prices determined by competition. This arrangement was held valid in *Laird & Company v. Cheney,* 196 Kan. 675, 414 P.2d 18 (1966).

After the manufacturer established the beginning price and had it affirmed, the Alcoholic Beverage Control Board of Review (ABC) established a reasonable markup for the distributor and retailer taking into consideration all business costs and a reasonable profit. Each distributor was authorized to sell any brand of liquor anywhere in the state to any retailer. This system is known as "open franchising." In addition, it prohibited retailers from purchasing from a manufacturer and having him send invoices to distributors who in turn would bill the retailer with the goods sent directly from manufacturer to retailer. Kansas requires the liquor to be shipped exclusively to the distributor's warehouse. This is known as an "at rest" law. Kansas law also requires distributors to purchase liquor only from brand owners or manufacturers, or their exclusive agents. This purchase arrangement has been categorized as a "primary source" law. An excellent discussion of the historical and economic background of alcoholic liquor in Kansas is found in an unpublished article, "The

Status of Alcoholic Liquor in the State of Kansas: A Progress Report," written by William T. Terrell, Associate Professor of Economics at Wichita State University.

Reflecting constituent complaints on pricing and ABC complaints of illegal retail purchases out of state, the 1978 legislature created a Special Committee on Liquor Laws to conduct a study seeking remedies for the complaints. H.B. 2020 was the result of the Committee's study.

Briefly, H.B. 2020 is an attempt to obtain liquor prices which are competitive with surrounding states by introducing competition into the three-tiered structure. The affirmation technique at the manufacturer level was retained but at the distributor level, H.B. 2020 permits the distributor to negotiate brand franchise contracts for a territory statewide area or less, and allows the price to seek its own level in the market place as a result of competition between brands. The wholesale price established by the competition plus a reasonable markup determined by the ABC Board then becomes the retailer's minimum price to the consumer. The distributor must respect the franchise territory he has acquired and may not sell outside that area. There were nine licensed liquor distributors in Kansas at the time of trial: Standard Liquor Corporation; Grant-Billingsley Fruit Co., d/b/a Grant-Billingsley Wholesale Liquor Co., Inc.; Colby Distributing Co., Inc.; Kansas Distributors, Inc.; Eastern Distributing, Inc.; A-B Sales, Inc.; Sunflower Sales Co.; Famous Companies, Inc.; and D. A. Winters Co., a sole proprietorship. Neither Famous nor Winters are parties or intervenors in this suit. Colby sold

its business to Standard during the pendency of the appeal. The Wholesale Dealer's Association supported the passage of H.B. 2020; however, after its enactment, in the scramble for brand franchises, Colby, Grant-Billingsley, and Kansas Distributors were unsuccessful in obtaining the brands or area they sought. Standard and Famous each obtained statewide franchises on numerous popular brands of liquor. A-B Sales, Sunflower and Eastern Distributing were satisfied with their franchises, although the areas are less than statewide and are for fewer brands than Standard and Famous. The franchise alignment resulted in at least two wholesale competitors for all types of alcoholic liquor in every area of the state.

H.B. 2020 became effective May 10, 1979, but provided all distributors would have 120 days thereafter to dispose of the accumulated inventories of liquor brands for which they had not obtained a franchise. This action was filed July 17, 1979, by Kansas Distributors, Colby and Grant-Billingsley, against the secretary of revenue, director of alcoholic beverage control and members of the Alcoholic Beverage Control Board of Review. At that time, the trial court entered a temporary restraining order preventing implementation of H.B. 2020 until August 31, 1979.

On August 3, 1979, Standard, A-B Sales, Sunflower and Eastern were permitted to intervene in opposition to plaintiff's position; Vern Miller, Sedgwick County District Attorney, and The Kansas Retail Liquor Dealers Association intervened in support of the plaintiffs. It was never clarified by the parties why the district attorney of Sedgwick county was permitted to intervene on behalf of the people of Kansas in opposition to the attorney general.

The case was tried August 6 and 7, 1979. Plaintiff's evidence consisted of the testimony of John F. Grant, president of Grant-Billingsley Wholesale Liquor Co. and Albert C. Becker, president of Kansas Distributors, Inc., both of whom testified they did not oppose H.B. 2020 until they discovered they could not obtain the brand franchise or the territory they had anticipated. They stated Standard and Famous each held statewide franchises on a number of well known brands of wines and distilled spirts representing 32.33% and 31.83%, respectively of the total brands sold. They introduced documents showing the specific brands each had negotiated with suppliers. Both witnesses admitted plaintiffs had mutually agreed Colby would take the western Kansas territory, Grant-Billingsley central Kansas, and Kansas Distributors, Inc. eastern Kansas. Each would have the same brands, altogether constituting a statewide franchise. They further testified that as a result of Famous and Standard obtaining statewide franchises on so many popular brands, their projected volume would be reduced by two-thirds and they would be driven out of business.

Plaintiff's one other witness was William T. Terrell, a Wichita State University economist who had made a study of the Kansas Liquor Control Act. He testified in his opinion the exclusive franchise provisions of H.B. 2020 would create a wholesale liquor monopoly. He also stated, however, that under the law prior to H.B. 2020, Kansas was more of a control or monopoly state than a license state.

Defendants called Sen. Frank Gaines who testified the legislature intended to maintain the three-tiered liquor

control system in Kansas and passed H.B. 2020 as an exercise of the police power to lower prices to the consumer, maintain an orderly market and eliminate the importation of illegal liquor from out of state, thereby collecting more taxes within the state.

The defendants also called Leslie J. Rudd, president of Standard Liquor Corporation. He testified there would be brand competition under H.B. 2020 because of the proprietory or economic interest each distributor had in his franchised brands. That interest would create a savings in freight costs, a reduction in warehouse inventory and a more efficient operation, all resulting in a savings to the consumer. He also testified the prices he had filed with the ABC for September were below the prices for the same brands previously filed under the old law.

The challenge to the bill's constitutionality generally centers around the actions dealing with exclusive franchising and price fixing by distributors. The sections under attack are too lengthy to include in this opinion. We have therefore, included the trial court's brief summation of the pertinent sections of H.B. 2020.

> "a. Sec. 2 allows distributors to sell only such brands of alcoholic liquor to only those retailers whose licensed premises are located within the geographic territory for which such distributor is authorized to sell such brand as designated in the notice or notices filed with the Director pursuant to Sec. 3;
>
> "b. Sec. 3 prohibits any distributor from selling any alcoholic liquor in this state unless such distributor has filed with the Director a written notice stating each geographic territory as has been agreed upon be-

tween such distributor and a distiller within which such distributor shall sell to retailers one or more brands of such distiller. Said section further provides that no distiller shall grant such a franchise for the distribution of a brand to more than one distributor for all or part of any designated territory. Said section likewise proscribes and limits in subsections (3), (4), (5) and (6) the ability of any such distiller or such distributor to terminate or modify any such franchise or to alter the geographic territory designated in such franchise agreement, except for reasonable cause;

"c. Sec. 4 prohibits any distributor of alcoholic liquor from selling a brand or kind of such liquor to any retailer whose licensed premises are located outside said distributor's exclusive franchise territory for such brand as established under Sec. 3 described hereinabove. Sec. 4 further prohibits any distiller or distributor from fixing, maintaining, coercing or controlling the resale price of such alcoholic liquor to be resold by such distributor or distiller, but specifically authorizes distributors to furnish licensed retailers with a price list of the retail minimum price, including the minimum mark-up, for all such liquor sold by such distributors to such retailers;

"d. Sec. 5 prohibits any distributor of alcoholic liquor from purchasing any such liquor from any distiller unless such distiller shall file with the Director a written statement agreeing to sell any of the brands or kinds of such liquor manufactured and distributed by such distiller to any distributor licensed in this state and having a franchise to distribute such brands of such liquor, pursuant to Sec. 3, and to make such sales to all franchised distributors at the same current price and without discrimination and to file periodic price lists showing their current prices with the office

of the Director. Sec. 5 further prohibits any licensed retailer from purchasing any such liquor from any such distributor unless such distributor shall file with the Director a written statement agreeing to sell any of the brands or kinds of such liquor distributed by such distributor and to provide service in connection therewith to any licensed retailer whose licensed premises are located within the geographic territory of such distributor's franchise for such liquor, to make such sales to all such licensed retailers at the same current bottle and case price, and without discrimination and to file price lists showing such current bottle and case price in the office of the Director periodically;

"e. Sec. 6 specifically provides that the sales price of alcoholic liquor sold by distiller to licensed distributors of alcoholic liquor shall be no higher than the lowest price for which same is sold to distributors anywhere in the continental United States, and that the minimum mark-ups of such liquor to be sold by retailers licensed in this state should be determined and regulated by the ABC Board and thereby eliminates from any regulation whatsoever the price at which such liquor can be sold by distributors to retailers and the minimum price at which such liquor can be sold by retailers to consumers;

"f. Sec. 7, Sec. 8, Sec. 9 and Sec. 10 deal with the establishment of ABC Board of minimum mark-up which shall be charged by retailers in sales of alcoholic liquor to consumers;

"g. New Sec. 11 provides for a period of 120 days or until September 10, 1979, wherein a presently licensed distributor, such as the Plaintiffs herein, may sell any alcoholic liquors that such distributor may

have on hand at the time this Act takes effect in the same manner, and to the same purchasers as such distributor was authorized to sell the same prior to May 10, 1979."

Section 14 is the amending and repealing portion of the bill.

The trial court rendered its decision August 31, 1979. It found:

"4. The state has the right to establish and regulate franchise areas under the police power to regulate the liquor industry so long as these laws do not interfere or impede valid federal law or constitutional safeguards. Providing for suppliers and distributors to establish exclusive franchise areas without state intervention or state power to control or regulate has no reasonable rational relation to the purpose of fostering temperence and orderly marketing conditions. The effect of the exclusive franchise system authorizes private persons to engage in anti-competitive conduct and constitutes a violation of the Sherman Act.

"5. It is even more pernicious to allow price fixing with an exclusive franchise to sell, both controlled by the same non-government entity, without regulation by the state.

. . . . .

"Therefore, the following sections are declared void in accordance with these findings, conclusions and decisions:

a. Section 7
b. Section 8
c. Section 9
d. Section 10

"12. The following sections are valid except as follows:

a. New Section 3(1)—Delete 'No manufacturers, importer or other supplier shall grant a franchise for the distribution of a brand to more than one distributor for all or part of any designated territory.'

b. Section 6—Delete 'and (b) that minimum mark-ups on alcoholic liquor sold by retailers licensed in this state should be determined and regulated by law.'

c. Section 10(2)—Delete 'plus minimum mark-up.'

All other sections are valid."

A permanent injunction was granted with the judgment barring implementation and enforcement of the invalid portions of H.B. 2020.

On September 5, 1979, the trial court denied defendants' application for an injunction pending an appeal, which enabled the defendants and the ABC Board to continue operating under the prior law, but stayed the judgment until September 10, 1979. Defendants perfected their appeal and on September 10 requested a stay of H.B. 2020 and the trial court's judgment pending the appeal. This court stayed the trial court's order but refused to stay H.B. 2020 which became effective that day.

The plaintiffs cross appealed on September 17, 1979, placing all of the issues raised by the pleadings and the judgment of the trial court before this court, challenging the constitutionality of H.B. 2020.

For purposes of clarity, we will hereafter refer to the plaintiffs as appellees and the defendants as appellants.

We will begin our discussion by reviewing several well established rules pertaining to legislative enactments.

> "It is fundamental that our state constitution limits rather than confers powers. Where the constitutionality of a statute is involved, the question presented, is therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby. [Citations omitted.]
>
> "The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. [Citations omitted.]
>
> "In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. [Citations omitted.]
>
> "Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt. [Citations omitted.]
>
> "Courts do not strike down legislative enactments on the mere ground they fail to conform with a strictly legalistic definition or technically correct interpretation of constitutional provisions. The test is rather whether the legislation conforms with the common understanding of the masses at the time they adopted such provisions and the presumption is in favor of the natural and popular meaning in which the words were understood by the adopters. [Citations omitted.]" *State ex rel. Schneider v. Kennedy,* 225 Kan. 13, 20-21, 587 P.2d 844, 850 (1978).

*City of Baxter Springs v. Bryant,* 226 Kan. 383, 598 P.2d 1051 (1979).

As a result of the stays granted in this litigation, in addition to the legislative 120 day delay postponing the effective date of the act (new Section 11, H.B. 2020), the provisions of H.B. 2020 were not in effect on the date of trial, rendering the evidence presented highly speculative. Our concern here is primarily with the constitutionality of the provisions of H.B. 2020 on its face. Appellees allege sections 2, 3, 11 and 14 violate the Sherman Anti-Trust Act and, as such, are invalid under the supremacy clause of the U.S. Constitution. U.S. Const., art. VI, cl.2.

In considering any state law regulating intoxicating liquors, we must begin with the Twenty-first Amendment, the second section of which provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The manufacture, sale and use of intoxicating liquors has traditionally been a subject of governmental regulation at both federal and state levels. Such regulation is viewed as a valid exercise of the police power to protect the public health, welfare and morals. See *Crane v. Campbell,* 245 U.S. 304, 38 S.Ct. 98, 62 L.Ed. 304 (1917); *Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887); *The License Cases,* 46 U.S. 504, 12 L.Ed. 256 (1847). When the Eighteenth Amendment was repealed in 1933 by the Twenty-first Amendment, each state was granted broad regulatory power over liquor traffic within its borders.

That regulatory power included the authority to completely forbid the importation of liquor if a state so desired. *U. S. v. Frankfort Distilleries,* 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945); *State Board v. Young's Market Co.,* 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936). A state's power to regulate intrastate operations of liquor traffic is not restricted by the commerce clause. *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939). In *Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324, 330, 84 S.Ct. 1293, 1296. 12 L.Ed.2d 350 (1964), the Supreme Court held that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." That holding was more recently affirmed in *Seagram & Sons v. Hostetter,* 384 U.S. 35, 42, 86 S.Ct. 1254, 1259, 16 L.Ed.2d 336 (1966).

Although the Twenty-first Amendment grants broad regulatory powers to a state with regard to intrastate regulation of liquor traffic, a state may not exercise exclusive control over liquor shipments passing through its borders which are destined for interstate use. See *Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350; and *Collins v. Yosemite Park Co.,* 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938).

It is argued the state's almost absolute regulatory control recognized in *Seagram & Sons* was modified in *Craig v. Boren,* 429 U.S. 190, 97 St.Ct. 451, 50 L.Ed.2d 397 (1976). In that case, the Supreme Court struck down an Oklahoma law which prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18. Okla.

Stat. tit. 37, §§ 241 and 245 (1958 and Supp. 1976). The court found the "gender-based differential" contained in the statutes constituted a denial of equal protection to males between the ages of 18 and 20. Because the case concerned statutes pertaining to liquor regulation, the court discussed the role of the Twenty-first Amendment and whether the power it conferred upon states in the field of liquor regulation was strong enough to withstand an equal protection challenge. The court held "the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment." *Craig v. Boren*, 429 U.S. at 204-205, 97 S.Ct. at 461. The issues before the court did not directly involve an application of the Commerce Clause. The court did, however, reaffirm the rule that while the Twenty-first Amendment did not repeal the Commerce Clause, the Amendment "created an exception to the normal operation of the Commerce Clause." *Craig v. Boren*, 429 U.S. at 206, 97 S.Ct. at 461. That exception is clearly the overwhelming power granted the states in the area of liquor regulation. We find the issues before the court in *Craig* did not directly involve the state's regulatory power in liquor traffic and the earlier holdings conferring that power were not modified.

This court has followed the rationale of U.S. Supreme Court cases, commencing with *State v. Payne*, 183 Kan. 396, 403, 327 P.2d 1071, 1078 (1958), where we stated:

> "It has been repeatedly held that under the 21st Amendment a state may absolutely prohibit the manufacture, transportation, importation, sale or possession of alcoholic liquors irrespective of when or where

> produced or obtained, or the use to which they are to be put, and may adopt measures reasonably appropriate to effectuate those inhibitions and exercise full police authority in respect to them, unfettered by the due process clause, the equal protection clause or the commerce clause."

These general principles were followed in *Laird & Company v. Cheney*, 196 Kan. 675, 414 P.2d 18; and *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 408 P.2d 877 (1965).

It is argued by appellees that this court deviated from those rules in *City of Baxter Springs v. Bryant*, 226 Kan. 383, 598 P.2d 1051. We do not agree with that rationale. *City of Baxter Springs* involved a suit by the city against the proprietor of a local disco for violation of city ordinances prohibiting dispensing of beer and allowing dancing in the disco. In addition, the proprietor was charged with failure to provide an unobstructed view of the premises from the street. We discussed the application of the Twenty-first Amendment in considering the constitutionality of the city ordinances which pertained to regulation of establishments serving cereal malt beverages. The court held the ordinances unconstitutional because they were not "reasonably calculated to promote the health, sanitation, morals, or general welfare of the residents of Baxter Springs. . . ." *City of Baxter Springs v. Bryant*, 226 Kan. at 392, 598 P.2d at 1059. The central issue before the court in that case was the regulation of certain types of activity in or around an establishment that dispensed cereal malt beverages. This court found a state may not, under color of the Twenty-first Amendment, impinge upon individual

rights protected by the Due Process and Equal Protection clauses. See *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451. The case did not, however, deal directly with the state's broad authority to regulate the manufacture, distribution, sale, possession and consumption of alcoholic liquor. We find that regulatory power was not modified or lessened in *City of Baxter Springs.*

In addition to the weight of authority, both federal and state, which supports the broad regulatory power of a state, in the area of alcoholic liquor, we find another rationale for upholding H.B. 2020. The provisions of H.B. 2020 on its face will allow sufficient brand and price competition to withstand allegations of a violation of the Sherman Anti-Trust Act. The law is neutral and provides that any licensed distributor may obtain an exclusive franchise for one or more brand of alcoholic liquor from any licensed manufacturer for any designated area of the state. There are eight distributors, 14 categories of liquor, approximately 80 manufacturers, and well in excess of the 260 brands of alcoholic liquor initially referred to in trial exhibits, each of which is subject to a separate franchise. On its face, that would appear to present ample opportunity for each to exercise its own perseverance to obtain products and territory. If one or more fails to obtain its share of the market the law is not at fault; it is one of the hazards of a free market.

Although appellees introduced testimony showing Standard has 32.33% of the market and Famous has 31.83% of the market, there is no evidence the two companies have together embarked upon a monopolistic venture. Appellees

further admit Colby, Grant-Billingsley and Kansas Distributors jointly agreed to make franchise applications for the same brands, each taking a prearranged portion of the state. This indicates they themselves may have conspired to restrain trade. Nothing in the testimony or exhibits proves H.B. 2020, on its face, provides for a combination in restraint of trade. Mr. Terrell concluded a monopoly would eventually result. We believe we may assume competition presently exists and will continue. Should any manufacturer, distributor or combination thereof conspire to restrain trade, the anti-trust laws are available as a remedy.

By allowing the liquor price to seek its own level at the second tier of the liquor system, the legislature has released liquor pricing from its former status as a totally controlled commodity. The price is no longer totally regulated, totally fixed and can now fluctuate as the competition in the market place will determine. With respect to exclusive franchising, we have noted there are now at least two distributors operating in every area of the state. Each distributes different brands, which compete with one another. Although each distributor completely controls the distribution of its brands within its territory we find the competition among brands to be sufficient to withstand claims of restraint of trade. We are urged by appellees to consider the recent California cases of *Midcal Aluminum, Inc. v. Rice*, 90 Cal.App.3d 979, 153 Cal.Rptr. 757 (1979), and *Rice v. Alcoholic Bev. etc. Appeals Bd.*, 21 Cal. 3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978). *Rice* struck down California price maintenance statutes as a violation of policies of the Sherman Anti-Trust Act. while *Midcal*

*Aluminum, Inc.* struck down fair trade and wine price posting provisions of the California Alcoholic Beverage Control Act, as violative of the Sherman Act. We have carefully considered these cases and find them contrary to our law and without precedent in Kansas.

We now turn to appellees' specific constitutional arguments. Appellees argue they are denied due process because they are denied the right to continue a lawful occupation. In addition, they argue the Act creates classifications which have no rationale, real or substantial relationship to public safety, health, general welfare or legislative purpose in violation of the Fourteenth Amendment of the U.S. Constitution and sections 1 and 2 of the Bill of Rights of the Kansas Constitution. From our examination of the Act, we discern no such classifications or denial of the right to continue operating. All distributors are eligible to franchise any brand with state-wide territory or less. Nothing in the law denies a distributor the right to pursue liquor wholesaling. The legislature enacted legislation permitting exclusive brand franchising comparable to franchises in other industries. The size of the franchise territory and the designation of the brands are left to private agreement under the best traditions of a free society. The stated legislative purpose is to introduce competition into the pricing of liquor to the public, thereby promoting the public welfare and stopping illegal liquor traffic from out of state by offering a more competitive price. There is nothing before us to show the stated purpose is not working. The appellees' complaint is an economic one over which this court has little control. As the court stated in

*Seagram & Sons v. Hostetter*, 384 U.S. at 47, 86 S.Ct. at 1262:

> "[I]t is not 'the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.'"

See also *State ex rel. Schneider v. Kennedy*, 225 Kan. at 21, 587 P.2d 844.

Appellees' final point is that sections 2 through 11 and section 14 of H.B. 2020 are unconstitutional because they provide for an impermissible delegation of legislative authority to private persons in violation of Article 2, section 1 of the Kansas Constitution. They cite *Quality Oil Co. v. du Pont & Co.*, 182 Kan. 488, 323 P.2d 731, in support of the argument. *Quality* is distinguishable from the instant case. There, this court considered the Kansas Fair Trade Act which authorized a trademark owner to contract with one retailer for a minimum retail price for a named brand commodity and all retailers were bound thereby with notice. The non-signers were bound by the price agreement even though they were not parties to the contract. It left to the trademark owner the determination of whether or not a minimum price would be imposed upon which commodities and the amount. Here, the legislature determined it would not regulate wholesale prices but would let them seek their level in the competition of the market place. We understand this technique to be tradi-

tional in the capitalist society and thought by most to be the best method of determining a fair market price as long as competition is present. It is difficult to comprehend the logic of how a purposeful legislative decision to remove regulation can be transformed to the unlawful delegation of authority to regulate.

H.B. 2020 reflects the legislature's determination that a minimum price was necessary to insure an orderly market and to promote temperance and that it should be determined by the competition among wholesalers plus a minimum markup determined by the ABC Board of Review from the formula furnished by the legislature. This constitutes a permissible delegation of the ministerial act of administering the pricing regulation with a clear cut guideline. In *Laird & Company v. Cheney*, 196 Kan. 675, 414 P.2d 18, we held fixing wholesale liquor prices at the lowest price for which the item is sold anywhere in the United States was not violative of the commerce clause, the due process or equal protection clauses of the Fourteenth Amendment or comparable sections of the Kansas Constitution. Such practice is completely parallel to the method authorized in H.B. 2020.

We hold pursuant to the power and authority granted the state by the Twenty-first Amendment and pursuant to Article 15, § 10 of the Kansas Constitution, to promote temperance and for the protection of the general welfare, health and safety of the people of Kansas, the legislature properly acted to permit a system of exclusive brand franchises for distributors of alcoholic liquor in Kansas for the purpose of introducing competitive pricing into the

middle tier of the Kansas liquor distribution system and in passing the results of the competition onto the consumer through the retailer at not less than the competitive price, plus minimum markup. We hold Chapter 153 of the 1979 Session Laws of Kansas, known as H.B. 2020, a wholly constitutional enactment of the legislature.

The judgment of the trial court is affirmed in part and reversed in part in conformity with this opinion.

FROMME, J., not participating.

## Appendix B

In the Third Judicial District

District Court, Shawnee County, Kansas

Case No. 79-CV-896

[August 31, 1979]

Colby Distributing Co., Inc., et al.,
Plaintiffs,

vs.

Michael C. Lennen, et al.,
Defendants.

## MEMORANDUM OPINION

This is an action filed by three wholesalers (distributors) against the Secretary of Revenue, the Director of Alcohol Beverage Control and members of the Alcoholic Beverage Control Board of Review of the State of Kansas seeking a declaratory judgment and permanent injunction from the enforcement of House Bill No. 2020, enacted by the state legislature, effective May 10, 1979.

The plaintiffs are licensed distributors of alcoholic liquor in accordance with the Kansas Liquor Act, pursuant to K.S.A. 1978 Supp. 41-103(8), 41-306 and 41-311. The intervenors are four licensed distributors, Standard Liquor Corporation, A-B Sales, Inc.; Sunflower Sales Company; and Eastern Distributing Company; the District Attorney of Sedgwick County, Kansas; and the Kansas Retail Liquor Dealers Association as amicus.

The defendants are the duly qualified agencies who regulate and enforce the liquor laws of Kansas.

The case was tried to the Court on August 6 and 7, 1979 and then taken under advisement pending briefs of the parties. The Court is most grateful to counsel for all parties for their diligence and assistance in submitting most thorough and exhaustive briefs to assist the Court on a matter of first impression before the Kansas Courts.

The issue before the Court is the legality of portions of H.B. 2020 as they pertain to the creation of exclusive franchising between the suppliers (distillers) of alcoholic liquor and the distributors and the change from fixing minimum prices on liquor sold by distributors and licensed retailers to the removal of this price fixing over the distributor and the setting of minimum mark-ups over the retailers, as specifically set out herein below.

A cursory background is in order here. In 1949, Kansas enacted the Kansas Liquor Control Act (K.S.A. 41-101 et seq.) which provides for the regulation of all phases of the manufacture, distribution, sale, possession and consumption of alcoholic liquor. Except for 1965 and again in 1978 (Private Club Act and Restaurant Club Act) the Act has been virtually unchanged.

Kansas has the three-tier system whereby the supplier (manufacturer) can only sell to the distributor (wholesaler) who can only sell to the retailer; none can own any interest in the other and all are licensed by the state.

Prior to the enactment of H.B. 2020, the liquor act provided only for "open wholesaling", prohibiting exclusive distributorship arrangements. It required suppliers to sell

to all distributors at the lowest prices they sell in other states. Distributors were required to sell to all licensed retailers on an equal basis. The minimum sales prices for liquor at wholesale and retail was established by the ABC Board of Review, allowing for mark-ups permitted to both. House Bill 2020 replaced the open wholesaling system for [sic] an exclusive franchise system which grants territories to the distributors to wholesale alcoholic liquor and eliminated regulation of minimum prices for distributors and retailers, providing for minimum mark-ups by retailers.

Sections K.S.A. 41-407, 41-1111, 41-1113, 41-1114, 41-1115 and 41-1117, and K.S.A. 1978 Supp. 41-306, 41-701, 41-719, 41-1101 and 41-1116 were amended and 41-1113 was repealed.

Under attack are the following:

Section 2, amending K.S.A. 1978 Supp. 41-306

Section 3, new section

Section 4, amending K.S.A. 1978 Supp. 41-701

Section 5, amending K.S.A. 1978-Supp. 41-1101

Section 6, amending K.S.A. 41-1111

Section 7, amending K.S.A. 41-1114

Section 8, amending K.S.A. 41-1115

Section 9, amending K.S.A. 1978 Supp. 41-1116

Section 10, amending K.S.A. 41-1117

Section 11, new section

Section 14, amending and repealing the above.

With this background the Court makes the following findings of fact, conclusions of law and decision:

## FINDINGS OF FACT

1. In substance, the pertinent portions of the Act provide as follows:

a. Sec. 2 allows distributors to sell only such brands of alcoholic liquor to only those retailers whose licensed premises are located within the geographic territory for which such distributor is authorized to sell such brand as designated in the notice or notices filed with the Director pursuant to Sec. 3;

b. Sec. 3 prohibits any distributor from selling any alcoholic liquor in this state unless such distributor has filed with the Director a written notice stating each geographic territory as has been agreed upon between such distributor and a distiller within which such distributor shall sell to retailers one or more brands of such distiller. Said section further provides that no distiller shall grant such a franchise for the distribution of a brand to more than one distributor for all or part of any designated territory. Said section likewise prescribes and limits in sub-sections (3), (4), (5) and (6) the ability of any such distiller or such distributor to terminate or modify any such franchise or to alter the geographic territory designated in such franchise agreement, except for reasonable cause;

c. Sec. 4 prohibits any distributor of alcoholic liquor from selling a brand or kind of such liquor to any retailer whose licensed premises are located outside said distributor's exclusive franchise territory for such brand as established under Sec. 3 described hereinabove. Sec. 4 further prohibits any distiller or

distributor from fixing, maintaining, coercing or controlling the resale price of such alcoholic liquor to be resold by such distributor or distiller, but specifically authorizes distributors to furnish licensed retailers with a price list of the retail minimum price, including the minimum mark-up, for all such liquor sold by such distributors to such retailers;

d. Sec. 5 prohibits any distributor of alcoholic liquor from purchasing any such liquor from any distiller unless such distiller shall file with the Director a written statement agreeing to sell any of the brands or kinds of such liquor manufactured and distributed by such distiller to any distributor licensed in this state and having a franchise to distribute such brands of such liquor, pursuant to Sec. 3, and to make such sales to all franchised distributors at the same current price and without discrimination and to file periodic price lists showing their current prices with the office of the Director. Sec. 5 further prohibits any licensed retailer from purchasing any such liquor from any such distributor unless such distributor shall file with the Director a written statement agreeing to sell any of the brands or kinds of such liquor distributed by such distributor and to provide service in connection therewith to any licensed retailer whose licensed premises are located within the geographic territory of such distributor's franchise for such liquor, to make such sales to all such licensed retailers at the same current bottle and case price, and without discrimination and to file price lists showing such current bottle and case price in the office of the Director periodically;

e. Sec. 6 sepcifically [sic] provides that the sales price of alcoholic liquor sold by distiller to licensed distributors of alcoholic liquor shall be no higher than the lowest price for which same is sold to distributors anywhere in the continental United States, and that the minimum mark-ups of such liquor to be sold by retailers licensed in this state should be determined and regulated by the ABC Board and thereby eliminates from any regulation whatsoever the price at which such liquor can be sold by distributors to retailers and the minimum price at which such liquor can be sold by retailers to consumers[ ;]

f. Sec. 7, Sec. 8, Sec. 9 and Sec. 10 deal with the establishment of ABC board of minimum mark-up which shall be charged by retailers in sales of alcoholic liquor to consumers;

g. New Sec. 11 provides for a period of 120 days or until September 10, 1979, wherein a presently licensed distributor, such as the Plaintiffs herein, may sell any alcoholic liquors that such distributor may have on hand at the time this Act takes effect in the same manner, and to the same purchasers as such distributor was authorized to sell the same prior to May 10, 1979.

2. Prior to H.B. 2020, the sale of alcoholic liquor was effected through a three-tier system of distribution, the effect of which was threefold: (1) the distiller was forced to sell to distributors at the lowest distillery price anywhere in the United States; (2) the minimum price charged by the distributor to the retailer was controlled and established by the ABC Board; and (3) the minimum price

which the retailers could charge to the public was likewise established by the ABC Board.

3. The amendments to the Liquor Act by H.B. 2020 drastically change the method of doing business at the distributor level, in that:

a. franchise territories are to be established for each distributor; and

b. each distributor may sell only to those retailers within the newly established franchised territory; and

c. no distiller shall grant a franchise to more than one distributor within the franchised territory; and

d. each distributor is free to establish and post with the ABC any price on any brand of alcoholic liquor of any kind as each distributor may, in his economic wisdom, so determine; and

e. the minimum mark-up, which the retailers are required to charge on all such liquor sold to the consumer public, is fixed by a formula consisting of the following expense items: (1) mean prices posted by distributors, (2) taxes, (3) mean selling costs of retailers, (4) the mean of other reasonable expenses, (5) a reasonable profit to the retailers. This formula is to be established by the ABC pursuant to certain statutory directives.

4. The "minimum mark-up" so established by Sec. 9, H.B. 2020, insofar as it applies to retailers, is essentially the same method used by the ABC Board prior to H.B. 2020. In effect, a percentage mark-up is established and that "mark-up" is applied across the board as to the cost

of merchandise to the retailer, which price will be posted by the distributors as heretofore set out. For example, the present rate of mark-up is 28.5% for all liquor. If a case of scotch whiskey were to be purchased by the retailer for $100, the minimum price to the public for that case would be $128.50. If a distributor desires to post a price of $125 per case of scotch whiskey to the retailer, the retailer's minimum price to the public would be (125 x 1.285) $160.62.

5. Pursuant to H.B. 2020, the distributor is free to change the price which it charges the retailer at any time by posting such price change with the Director. The result of this freedom statutorily granted to the distributor is to allow each distributor to effectively control and determine the minimum price for each brand of liquor for which it has a franchise since neither the Director nor the ABC Board has any regulatory control over the prices charged by the distributor to the retailer. Therefore, the ABC Board, the Director, the retailer, and the public at large all are forced by the statute to abide by the decision of the distributor as to the retail minimum price.

6. The Subject Sections of H.B. 2020, in effect, permit a licensed and franchised distributor of alcoholic liquor to establish the only sales price at which any retailer located within such distributor's franchise territory can purchase any brand or kind of alcoholic liquor that such distributor is franchised to sell. As a result, said distributor is authorized to set a monopoly price upon such brand or kind of alcoholic liquor within such franchise territory which is binding upon all retailers located within such franchise territory.

7. The Subject Sections of H.B. 2020, and, more particularly Sec. 4(4) and Sec. 10, further permit a licensed and franchised distributor of alcoholic liquor to establish the minimum sales price at which all retailers located within such distributor's franchise territory must sell such brand or kind of such liquor to all consumers or retail customers within such franchise territory. As a result, said distributor is authorized, by statute, to fix the minimum resale price on any such brand or kind of alcoholic liquor sold within such franchise territory and, in effect, to force all consumers or retail purchasers of such brand or kind of alcoholic liquor to purchase such liquor at no less than said distributor's minimum retail price.

8. The Liquor Act, as amended by H.B. 2020, removes all authority from the Director and ABC Board to determine or regulate either the price charged for alcoholic liquor by distributors to retailers, or the minimum price which must be charged by retailers to consumers for such liquor. Said Act contains no standards governing the determination of such prices by such franchised distributor nor does said Act contain any procedure whereby said Director or said ABC Board can determine the reasonableness of such prices.

9. The Act, as amended by H.B. 2020 and, more particularly, sections 2, 3, 4 and 5, permit a licensed distiller and a licensed distributor to establish a geographic franchise territory for the exclusive sale of one or more brands or kinds of alcoholic liquor of such distiller by such distributor, and prohibit the sale of such brand or kind of such liquor within such territory by more than one such

distributor. Said sections further permit one licensed distributor to establish such franchises for more than one brand or kind and with more than one distiller and, thereby, preclude all other licensed distributors from selling all such brands or kinds of such liquor of such distillers within such franchised territories. As a result, said franchised distributors and said distiller are authorized to create a monopoly in the distribution and sale of such brand or kind of alcoholic liquor in a geographic area which may be, if the parties so choose, as large as the entire state of Kansas. Furthermore, any one licensed distributor is permitted to establish such a monoploy [sic] in as many brands or kinds of alcoholic liquor of as many distillers as shall agree to franchise such distributor. As a result, one distributor is permitted to establish a franchise monopoly for a geographic territory as large as the state of Kansas, and to establish such a monopoly in as many brands or kinds of alcoholic liquor of as many distillers as such distributor may desire, and thereby preclude and prevent all other licensed distributors from engaging in the distribution of all such brands or kinds of such liquor.

10. The Act, as amended by H.B. 2020, contains no standards by which the geographic size or the number of such monopoly franchises may be measured, determined or limited, and the Director and the ABC Board are given no authority to determine the reasonableness of the size of such franchised territories nor to regulate or limit the number of such monopoly franchises which may be obtained by any one licensed distributor.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matters here notwithstanding the issues as framed concern federal questions and interpretation of federal laws as they may apply to state laws.

2. H.B. 2020, and, more particularly, Sec 4(4) and Sec 10, permit a licensed and franchised distributor of alcoholic liquor to establish the minimum sales price at which all retailers located within such distributor's franchised territory must sell such brand or kind of such liquor to all consumers or retail customers. Such resale price maintenance by franchised and licensed distributors violates Section 1 of the Sherman Act (15 U.S.C. § 1).

3. (a) It is true that the twenty-first Amendment of the U.S. Constitution created an exception to the normal operation of the Commerce Clause but consistently the federal courts have held that the Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision be considered in the light of each other. The Sherman Act derives its authority from the Commerce Clause. Neither does this amendment prevail over other provisions of the Constitution where the regulation or law of the state in the field of alcoholic beverages tends to be discriminatory. See City of *Baxter Springs vs. Bryant*, # 50,747, opinion filed August 9, 1979.

(b) Is a violation of the Sherman Act, which this Court has found, saved by the Twenty-first Amendment? If the state through H.B. 2020 imposed price fixing throughout the three tiers, a valid argument may be made that the state may prescribe and fix prices for resale in intrastate

commerce in contravention of [the] Sherman [Act]. But here, the distributor, not the state controls the ultimate price the consumer pays. The state regulates the retailer's pricing, as required in sections 7, 8, 9 and 10, but the cost to the retailer in the purchase of liquor from the distributor is a prime factor in establishing ultimate price paid by the consumer. Where a private person or persons has the discretion to set the price an attempt by the state as contemplated in H. B. 2020 to regulate resale price is illegal as a violation of the Sherman Act. The state does not participate in determining the minimum price to be charged by the distributor. In essence, the statute permits the distributor to engage in resale price maintenance and to control the dollar volume of the mark-up. In addition, this provision constitutes an attempt by [sic—presumably the words "to delegate" should be substituted for "by"] the legislative power to control pricing, which is illegal. *Quality Oil Co. v. Dupont & Co.*, 182 Kan. 488, 322 P. 2d 731.

(c) Reference has been made to the twenty-first Amendment and the Sherman Act. In essence, they respectively provide:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited" (Twenty-first)
>
> "Every contract, combination in the the [sic] form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is hereby declared to be illegal" (Sherman Act)

4. The state has the right to establish and regulate franchise areas under the police power to regulate the

liquor industry so long as these laws do not interfere [with] or impede valid federal law or constitutional safeguards. Providing for suppliers and distributors to establish exclusive franchise areas without state intervention or state power to control or regulate has no reasonable rational relation to the purpose of fostering temperance and orderly marketing conditions. The effect of the exclusive franchise system authorizes private persons to engage in anti-competitive conduct and constitutes a violation of the Sherman Act.

5. It is even more pernicious to allow price fixing with an exclusive franchise to sell, both controlled by the same non-government entity, without regulation by the state.

6. The proposed exclusive franchise does not tend to preserve public health, safety or welfare but has a tendency to stifle legitimate business by creating a monopoly or trade barrier, in violation of the Sherman Act and is unconstitutional as an invasion of the property rights of the individual.

7. The beneficial purpose of these amendments that prices to the consumer will be lowered is insufficient when gauged by constitutional deficiencies.

8. The state alludes to the preservation of the three-tier system but in fact, the balance is upset when one of the entities, here the distributor, is clothed with sole and discretionary resale price maintenance coupled with an exclusive franchise to sell certain alcoholic liquor. In no way is this Court inferring that any distributor will nefariously employ this new statute to his gain and to the detriment

of the public good. Even proof that prices will be reasonable and the retailer will end up with better service from the distributor are not sufficient to uphold resale price fixing and exclusive franchise. The point here is that they are contrary to public policy and even the good will and intent of the distributors are not sufficient to overcome this deficiency. Nor is the statute saved because they are performed under complusion [sic] of law.

9. The Court is well aware of the ramifications of its decisions declaring price fixing and exclusive franchising as void. The effect may very well presume open and free competition and pricing as in other commercial endeavors. (Note the Special Committee's suggestion that removal of retail price control may be considered in the future.) (Proposal No. 16).

Until the legislature convenes next January, there is adequate law on the books to allow for control and regulation of the liquor industry. There is a savings provision in H.B. 2020 (section 12).

10. To insure an orderly marketing condition and create the least chaos until January of 1979, the Court's decision and findings on the issue of franchising as being invalid is directed solely to "exclusive franchising". The Court finds that providing for a franchise system permitting all distributors to participate in obtaining territories and engaging in intrabrand competition does not constitute a violation of [the] Sherman [Act], is not anti-competitive nor cause any chilling effect on federal or state law. The legislature will have to be the final judge of the wisdom of non-exclusive franchising.

11. Further, in the decision that resale price maintenance is invalid, the compelling interest of the state is more apparent in regulating supplies and distributors in the orderly business of transporting into the state and in the wholesale distribution of liquor to the retailer.

Therefore, the following sections are declared void in accordance with these findings, conclusions and decisions:

a. Section 7

b. Section 8

c. Section 9

d. Section 10

12. The following sections are valid except as follows:

a. New section 3(1)—Delete "No manufacturers, importer or other supplier shall grant a franchise for the distribution of a brand to more than one distributor for all or part of any designated territory."

b. Section 6 –Delete "and (b) that minimum mark-ups on alcoholic liquor sold by retailers licensed in this state should be determined and regulated by law".

c. Section 10(2)—Delete "plus minimum mark-up".

All other sections are valid.

13. By striking all reference to exclusiveness of franchises, each of the nine Kansas distributors is free to negotiate with the suppliers and manufacturers for a territory they can best serve. This would allow for intrabrand competition between distributors and only require the distributor to have in inventory those brands it can sell under its franchise as compared with the old law requiring full inventory of all brands.

14. The present Act requires the supplier to sell to distributors at a price no higher than the lowest price the item is sold in the U.S. (Section 6). It requires the distributor to sell to the retailer at the same current bottle and case price without discrimination (Section 5(2)). The retailer may not sell any liquor at less than its current posted bottle cost (Section 10(2)). The prohibition against inducements, et cetera is still preserved in Chapter 41, Article 7.

Plaintiffs are granted permanent injunction restraining and enjoining the defendants, their officers, agents and employees from implementing and enforcing those portions of H.B. 2020 consistent with this decision.

This decision is effective this 31st day of August, 1979.

/s/ MICHAEL A. BARBARA
Michael A. Barbara
District Judge, Div. II

## Appendix C

In the Supreme Court of the State of Kansas

No. 51,428

Colby Distributing Co., Inc., et al
Appellee

v.

Michael C. Lennen, et al
Appellants

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing.

Considered and DENIED.

Yours very truly,

Lewis C. Carter
*Clerk, Supreme Court*

Date April 9, 1980

## Appendix D

In the Supreme Court of the State of Kansas

Case No. 51,428

Grant-Billingsley Wholesale Liquor Company, Inc.,
Appellant,

vs.

Michael C. Lennen, et al.,
Appellees.

[Filed June 25, 1980]

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Grant-Billingsley Wholesale Liquor Company, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Kansas, in the case of Colby Distributing Co., Inc., et al., Plaintiffs-Appellees and Cross-Appellants, v. Michael C. Lennen, et al., Defendants-Appellants, bearing the above captioned case number. The judgment of the Supreme Court of the State of Kansas hereby appealed was subject to a timely petition for rehearing, which that Court denied on April 9, 1980, with mandate issuing on April 21, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ JAMES W. SARGENT

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Attorneys for Appellant

[Certificate of Service Omitted in Printing]

In the Third Judicial District

District Court, Shawnee County, Kansas
Civil Department

Case No. 79 CV 96

Grant-Billingsley Wholesale Liquor Company, Inc.,
Appellant,
vs.
Michael C. Lennen, et al.,
Appellee.

[Filed June 25, 1980]

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Grant-Billingsley Wholesale Liquor Company, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, in the case of Colby Distributing Co., Inc., et al., Plaintiffs-Appellees and Cross-Appellants, v. Michael C. Lennen, et al., Defendants-Appellants, bearing the case number of 51,428. The judgment of the Supreme Court of the State of Kansas hereby appealed was subject to a timely petition for rehearing, which that Court denied on April 9, 1980, with mandate issuing on April 21, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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## Appendix E

### HOUSE BILL No. 2020

An Act amending and supplementing the Kansas liquor control act; providing for a territorial franchise system on distribution of certain alcoholic liquors; eliminating the regulation of minimum prices of distributors and retailers; providing for minimum mark-ups by retailers; allowing removal of alcoholic liquor from bonded warehouses between sunset and sunrise; removing certain prohibitions against the consumption of alcoholic liquors in certain places amending K.S.A. 41-407, 41-1111, 41-1114, 41-1115 and 41-1117 and K.S.A. 1978 Supp. 41-306, 41-701, 41-719, 41-1101 and 41-1116 and repealing the existing sections; also repealing K.S.A. 41-1113.

Be it enacted by the Legislature of the State of Kansas:

• • • • • • • • •

Sec. 2. K.S.A. 1978 Supp. 41-306 is hereby amended to read as follows: 41-306. An alcoholic liquor distributor's license, except a beer distributor's license, shall allow: (1) The wholesale purchase, importation, *and* storage ~~and sale~~ of alcoholic liquors, except beer, ~~to licensees in this state and to such persons without the state as may be permitted by law~~, but all such alcoholic liquor so purchased or imported which is manufactured in the United States shall be purchased from the primary American source of supply or from another licensed distributor, except that a licensed distributor may purchase confiscated alcoholic liquor at a sheriff's sale; ~~and~~

*(2) The sale of alcoholic liquors, except beer, to:*

*(a) Distributors licensed in this state,*

*(b) Retailers licensed in this state, except that a licensed distributor shall sell a brand of alcoholic liquor only to those retailers whose licensed premises are located in the geographic territory within which such distributor is authorized to sell such brand, as designated in the notice or notices filed with the director pursuant to section 3, and*

*(c) Such persons located outside such territory or outside this state as permitted by law;*

*(3)* The purchase of alcoholic liquors, except beer, in barrels, casks or other bulk containers and the bottling thereof before resale, but all bottles or containers filled with such alcoholic liquors shall be sealed, labeled, stamped and otherwise made to comply with all laws and rules and regulations governing the preparation and bottling of alcoholic liquors by manufacturers and with all federal rules, regulations and laws.

New Sec. 3. (1) No distributor of alcoholic liquor, except beer, shall sell any alcoholic liquor in this state unless such distributor has filed with the director a written notice stating each geographic territory, agreed upon in writing between the distributor and a supplier of the distributor, within which the distributor sells to retailers one or more brands of such supplier. Such notice shall be accompanied by a map outlining each geographic territory stated in the notice. No manufacturer, importer or other supplier shall grant a franchise for the distribution of a brand to more than one distributor for all or part of any designated territory.

(2) Each supplier of alcoholic liquors doing business within this state shall file with the director a written notice describing each geographic territory, agreed upon in writing between the supplier and a distributor, within which the distributor sells to licensed retailers one or more brands of the supplier.

(3) No supplier or distributor shall terminate or modify a franchise for the distribution of a brand of alcoholic liquor or alter the geographic territory designated in a franchise agreement unless such supplier or distributor files written notice thereof with the director not less than thirty (30) days prior to the termination, modification or alteration. In the case of an alteration [of] a franchise territory, such notice shall be accompanied by a map outlining the altered territory. Upon receipt of such notice, the director shall notify immediately, by certified mail, all affected parties of the impending termination, modification or alteration.

(4) Any notice filed by a supplier pursuant to subsection (3) shall be accompanied by an affidavit stating that the termination, modification or alteration is not caused by the failure of the distributor to violate any provision of the Kansas liquor control act or any rules and regulations adopted pursuant thereto.

(5) Any supplier or distributor aggrieved by a termination, modification or alteration made under subsection (3) may file an appropriate action in any district court of this state having venue, alleging that the termination, modification or alteration violates the franchise agreement between the supplier and distributor involved.

(6) No franchise agreement for the distribution of a brand of alcoholic liquor shall be terminated or modified, nor shall the territory designated in such an agreement be altered, except for reasonable cause.

(7) This section shall be part of and supplemental to the Kansas liquor control act.

Sec. 4. K.S.A. 1978 Supp. 41-701 is hereby amended to read as follows: 41-701. *(1)* No distributor or wholesaler shall sell or attempt to sell any alcoholic liquor within this state except to:

*(a)* A licensed manufacturer, licensed nonbeverage user or licensed distributor: ~~*Provided*, That a licensed distributor may sell or attempt to sell alcoholic liquor within this state to;~~ *or*

*(b)* A licensed retailer, except that, *subject to the provisions of subsection (2):*

*(i) No distributor of alcoholic liquor, except beer, shall sell a brand of alcoholic liquor to any retailer whose licensed premises are located outside of the geographic territory within which such distributor is authorized to sell such brand, as designated in the notice filed with the director pursuant to section 3; and*

*(ii)* No beer distributor shall sell beer to any retailer who is located outside the geographic territory designated in the notice filed with the director by the distributor pursuant to K.S.A. *1978 Supp.* 41-409-, ~~as amended: *Provided*, That~~

*(2) (a)* If any beer distributor ~~shall refuse~~ *refuses* to sell beer or provide service in connection therewith to any retailer located within such beer distributor's geo-

graphic territory, it shall be lawful for any other beer distributor to sell beer to such retailer.

*(b) If any licensed distributor of alcoholic liquor, except beer, refuses to sell alcoholic liquor which such distributor is authorized to sell or refuses to provide any service in connection therewith to any retailer located within such distributor's geographic territory, it shall be lawful for any other licensed distributor of alcoholic liquor, except beer, to sell such liquor to such retailer*

(3) No manufacturer of alcoholic liquor shall sell or attempt to sell any alcoholic liquor within this state except to a licensed manufacturer, licensed distributor or licensed nonbeverage user: ~~*Provided,*~~ *except* that the holder of a license to manufacture beer may also attempt to sell or sell beer manufactured by ~~him~~ *such manufacturer* to retailers licensed in this state: ~~*Provided further, That,*~~ *but* a licensed manufacturer of beer shall not sell or attempt to sell any beer manufactured by ~~him~~ *such manufacturer* containing not to exceed three and two-tenths percent (3.2%) of alcohol by weight to any person in this state other than a wholesaler or distributor licensed as such under the laws of this state relating to cereal malt beverages and malt products.

*(4)* No *supplier*, wholesaler, distributor, manufacturer or importer shall by oral or written contract or agreement, expressly or impliedly fix, maintain, coerce or control the resale price of *alcoholic liquor*, beer or cereal malt beverage to be resold by such wholesaler, distributor, manufacturer or importer, *except that a licensed distributor may furnish to retailers lists of the minimum bottle and case prices*

***required under subsection (2) of K.S.A. 41-1117 and amendments thereto.***

***(5)*** **Any *supplier,* wholesaler, distributor or manufacturer violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than five hundred dollars ($500) and not more than one thousand dollars ($1,000), to which may be added not to exceed six (6) months imprisonment ~~and~~. In addition, any *supplier,* wholesaler, distributor, manufacturer or importer violating the provisions of this section relating to fixing, maintaining or controlling the resale price of *alcoholic liquor,* beer or cereal malt beverage shall be liable in a civil action to treble the amount of any damages awarded plus reasonable attorney fees for the damaged party.**

**Sec. 5. K.S.A. 1978 Supp. 41-1101 is hereby amended to read as follows: 41-1101. (1) It shall be unlawful for any distributor licensed under this act to purchase any alcoholic liquor from any manufacturer, owner of alcoholic liquor at the time it becomes a marketable product, exclusive agent of such manufacturer or owner or distributor of alcoholic liquor bottled in a foreign country either within or without this state, unless such manufacturer, owner, exclusive agent or distributor shall file with the director a written statement sworn to by such manufacturer, owner, exclusive agent or distributor or, in case of a corporation, one of its principal officers, agreeing to sell any of the brands or kinds of alcoholic liquor manufactured or distributed by such manufacturer, owner, exclusive agent or distributor to any distributor licensed in this state *and having a franchise to distribute such alcoholic liquor pur-***

*suant to section 3,* to make such sales to all *such* licensed distributors in this state at the same current price and without discrimination and to file price lists showing the current prices in the office of the director as often as may be necessary or required by the director but at least once each three months. If any manufacturer, owner, exclusive agent or distributor making such agreement violates such agreement by refusing to sell *such alcoholic liquor* to any *such franchised* licensed distributor in this state or discriminates in current prices among such *franchised* licensed distributors making or attempting to make purchases of alcoholic liquor from such manufacturer, owner, exclusive agent or distributor, the director shall notify, by registered mail, each *such franchised* licensed distributor in this state of such violation. Thereupon, it shall be unlawful for *such* a *franchised* licensed distributor in this state to purchase any alcoholic liquor from such manufacturer, owner, exclusive agent or distributor. If thereafter *such* a *franchised* licensed distributor shall purchase any alcoholic liquor from such manufacturer, owner, exclusive agent or distributor such *franchised* licensed distributor's license shall be revoked by the director If any manufacturer, owner, exclusive agent or distributor of alcoholic liquor bottled in a foreign country making any agreement hereunder shall not have a sufficient supply of alcoholic liquor of any of the brands or kinds which such manufacturer, owner, exclusive agent or distributor manufactures or distributes to supply the demands of all licensed distributors *having a franchise to distribute such alcoholic liquor*, such manufacturer, owner, exclusive agent or distributor may ration such alcoholic liquor and apportion the available supply among ~~the~~ *such franchised* licensed distributors purchasing or

attempting to purchase the same, in accordance with a plan which shall be subject to the approval of the director. The provisions of this subsection relating to the filing of price lists with the director shall not apply to any manufacturer with respect to alcoholic liquor manufactured or bottled in a foreign country.

(2) It shall be unlawful for any retailer licensed under this act to purchase any alcoholic liquor from any distributor licensed under this act unless such distributor shall file with the director a written statement sworn to by such distributor, or in case of a corporation by one of its principal officers, agreeing to sell any of the brands or kinds of alcoholic liquor distributed by such distributor *and to provide service in connection therewith* to any *licensed* retailer ~~licensed in this state~~ *whose licensed premises are located within the geographic territory of such distributor's franchise for such alcoholic liquors, unless written approval to do otherwise is obtained from the director;* to make such sales to all such licensed retailers at the same current *bottle and case* price and without discrimination; and to file price lists showing the current *bottle and case* price in the office of the director as often as may be necessary or required by the director but at least once each three months. If any distributor making such agreement violates such agreement by refusing to sell *or provide service* to any *such* licensed retailer in this state *without written approval of the director* or discriminates in current prices among such licensed retailers making or attempting to make purchases of alcoholic liquor from such distributor, the director shall revoke the license of such distributor. If any licensed distributor making any agreement here-

under shall not have a sufficient supply of alcoholic liquor of any of the brands or kinds which such distributor distributes to supply the demands of all *such* licensed retailers such distributor may ration such alcoholic liquor and apportion the available supply among the *such* licensed retailers purchasing or attempting to purchase the same, in accordance with a plan which shall be subject to the approval of the director.

(3) The provisions of this section shall not apply to any distributor of beer or any manufacturer or importer of beer, whether within or without this state, with respect to beer distributed or manufactured by such distributor, manufacurer or importer.

Sec. 6. K.S.A. 41-1111 is hereby amended to read as follows: 41-1111. In the public interest and in order to promote the orderly sale and distribution of alcoholic liquor, to foster temperance and to promote the public welfare, ~~in the state of Kansas~~, the legislature finds: (a) That sales prices of alcoholic liquor sold by manufacturers and others to distributors licensed in this state should be no higher than the lowest price for which the same is sold to distributors anywhere in the continental United States; and (b) that minimum ~~sale prices for~~ *mark-ups on* alcoholic liquor sold by ~~distributors and~~ retailers licensed in this state should be determined and regulated by law.

Sec. 7. K.S.A. 41-1114 is hereby amended to read as follows: 41-1114. The board shall establish ~~and fix minimum prices for which an item of alcoholic liquor may be sold by a retailer licensed in this state~~ *minimum mark-ups*

*which shall be charged by retailers on sales of alcoholic liquor* to consumers.

Sec. 8. K.S.A. 41-1115 is hereby amended to read as follows: 41-1115. The board, in exercising its powers and duties under the provisions of this act, shall establish ~~and determine: (a) The minimum "case prices" and the minimum "bottle sale prices" from distributor to retailer; and (b) the minimum "case prices," the minimum "bottle sale prices," and the minimum "mixed case sale prices" from retailer to consumer~~ *the minimum mark-up by retailers on sales of cases, bottles and mixed cases to consumers.*

Sec. 9. K.S.A. 1978 Supp. 41-1116 is hereby amended to read as follows: 41-1116. The ~~prices so~~ *minimum mark-ups* established ~~and fixed~~ by the board shall be fair and reasonable to ~~licensed distributors,~~ licensed retailers, and the ultimate consumer. ~~Said prices~~ *Such mark-ups* must be in the public interest and such that they do not unduly stimulate the sale and consumption of alcoholic liquor or tend to disrupt the orderly sale and distribution of alcoholic liquor. The board in establishing ~~and fixing such sales prices~~ *minimum mark-ups* shall take into consideration and be guided by the following: (a) The *mean of* acquisition costs ~~to~~ *of* licensed ~~distributors and~~ retailers. ~~The acquisition costs shall be the "case price" to distributors and the "minimum bottle sale price" to retailers;~~ (b) federal, state, and local taxes and license fees *which are* paid by ~~distributors and~~ retailers ~~which~~ *and* are levied or imposed in connection with their business of ~~distributing or~~ selling alcoholic liquor in this state; (c) *the mean* of selling costs of licensed ~~distributors and~~ retailers; (d) ~~cost of transpor-~~

~~tation to distributors from the F.O.B. shipping point to a base point in the state of Kansas, and delivery charges in connection with the shipment of alcoholic liquor; (e)~~ *the mean of* any legitimate, reasonable expense not hereinbefore specified, incurred in the legal conduct of ~~their~~ *licensed retailers'* businesses ~~as licensed distributors and retailers;~~ and ~~(f)~~ *(e)* a reasonable ~~markup or~~ profit for the licensed ~~distributors and~~ retailers. *The board may base its determination of the mean of retailers' acquisition costs, selling costs and operating expenses on a sampling of retailers generally representative of all retailers in the state.* To insure that ~~licensees~~ *retailers* in this state receive only a reasonable markup and profit, the alcoholic beverage control board of review, within ~~a reasonable time~~ *six (6) months* after the effective date of this act, shall conduct *and complete* studies to determine whether the present minimum mark-ups prescribed for ~~licensed distributors and~~ licensed retailers should be *maintained as currently established*, increased or decreased. *Until such studies are completed, the minimum mark-ups in effect immediately prior to the effective date of this act shall remain in effect.*

Sec. 10. K.S.A. 41 1117 is hereby amended to read as follows. 41-1117. *(1)* Whenever the board shall establish ~~and fix minimum distributor or~~ minimum retailer ~~sales prices~~ *mark-ups*, it shall immediately file a copy thereof with the director The director, ~~from time to time, and~~ at least once in each quarter of each year, shall publish ~~the prices so determined and fixed,~~ *such minimum mark-ups* and shall promptly mail a copy to each licensed distributor and retailer ~~and each supplier~~ authorized to do business in this state. ~~All manufacturers and others who have~~

~~filed their prices with the director and board shall be chargeable with a reasonable fee for the printing and mailing of the prices published by the director. Such prices~~ *Minimum mark-ups* shall become effective at twelve (12) o'clock midnight ~~of~~ *on the last day of the first calendar month commencing after the seventh* (7th) day following the day ~~the same~~ *such mark-ups* are mailed to licensed ~~distributors and~~ retailers. ~~On and after the effective date of said minimum sales prices,~~

(*2*) No ~~distributor~~ or retailer shall sell, directly or indirectly, any alcoholic liquor ~~listed in the then currently effective applicable schedule of minimum sales prices as published by the director~~ at less than its ~~listed price~~ *current posted bottle cost plus minimum mark-up* without first having obtained from the director a permit so to do; and the director is authorized to issue such a permit in the following cases:

~~(a) Where the item of alcoholic liquor was actually possessed by the distributor or retailer prior to the effective date of the initial fixing of the minimum sales price of the item;~~

~~(b)~~(*a*) where the ~~distributor or~~ retailer is actually closing out his *or her* stock for the purpose of completely discontinuing sale of such item of alcoholic liquor for a period of not less than twelve (12) months;

~~(c)~~(*b*) where the item of alcoholic liquor is damaged or deteriorated in quality and notice is given to the public thereof; or

~~(d)~~(c) where the sale of the item of alcoholic liquor is by an officer acting under the order of any court.

New Sec. 11. (1) Notwithstanding any contrary provision of this act, for a period of one hundred twenty (120) days after this act takes effect a licensed distributor may sell any alcoholic liquors which such distributor may have on hand at the time this act takes effect in the same manner and to the same purchasers as such distributor was authorized to sell the same prior to the effective date of this act.

(2) This section shall be part of and supplemental to the Kansas liquor control act.

New Sec. 12. If any provisions of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and, to this end, the provisions of this act are severable.

* * * * * * * * *

## Appendix F

### CONCENTRATION RATIOS FOR SPIRITS SOLD IN KANSAS

| Category | Single-Firm Market Share | Two-Firm Market Share | Three-Firm Market Share | Four-Firm Market Share |
|---|---|---|---|---|
| Rum | 90 % | 92.2% | 93.6% | 94.7% |
| Corn Whiskey | 84 | 94.8 | 99.9 | N/A |
| Tequila | 66.2 | 79.2 | 84 | 87.5 |
| Light Whiskey | 65.7 | 88.7 | 100 | N/A |
| Blended Whiskey | 63.4 | 86.8 | 91.5 | 93.7 |
| Brandy | 61 | 67.9 | 74.7 | 80.5 |
| Cordials | 58.9 | 68.2 | 74 | 78.8 |
| Cognac | 58.4 | 87.3 | 93.5 | 99.4 |
| Rye Whiskey | 38.4 | 76.8 | 95.4 | 99.9 |
| Irish Whiskey | 38.2 | 70.2 | 94.7 | 97.4 |
| Prepared Cocktails | 37 | 64.1 | 78.5 | 92.9 |
| Vermouth | 36.4 | 60.9 | 82.7 | 89.7 |
| Canadian Whiskey | 36.3 | 54.8 | 72.2 | 86.7 |
| Vodka (80 Proof) | 32.4 | 63.1 | 69.5 | 75.5 |
| Vodka (All Proofs) | 30 | 56.6 | 68.1 | 73.8 |
| Bonded Bourbon | 26.7 | 50.4 | 73.3 | 82 |
| Gin | 25.6 | 45.7 | 56.4 | 65.7 |
| Straight Bourbon | 18.9 | 31.8 | 44 | 54.3 |
| Scotch | 16.8 | 32.9 | 44.2 | 55.5 |

Source: 1. Kansas Division of Alcoholic Beverage Control "Report Concerning Shipments of Alcoholic Liquors by Classification and Brands from Distillers to Kansas Distributors for Fiscal Year July 1978 through June 1979"; defendants' ex. 1.

2. Kansas Edition of "Beverage News", June 1980.